



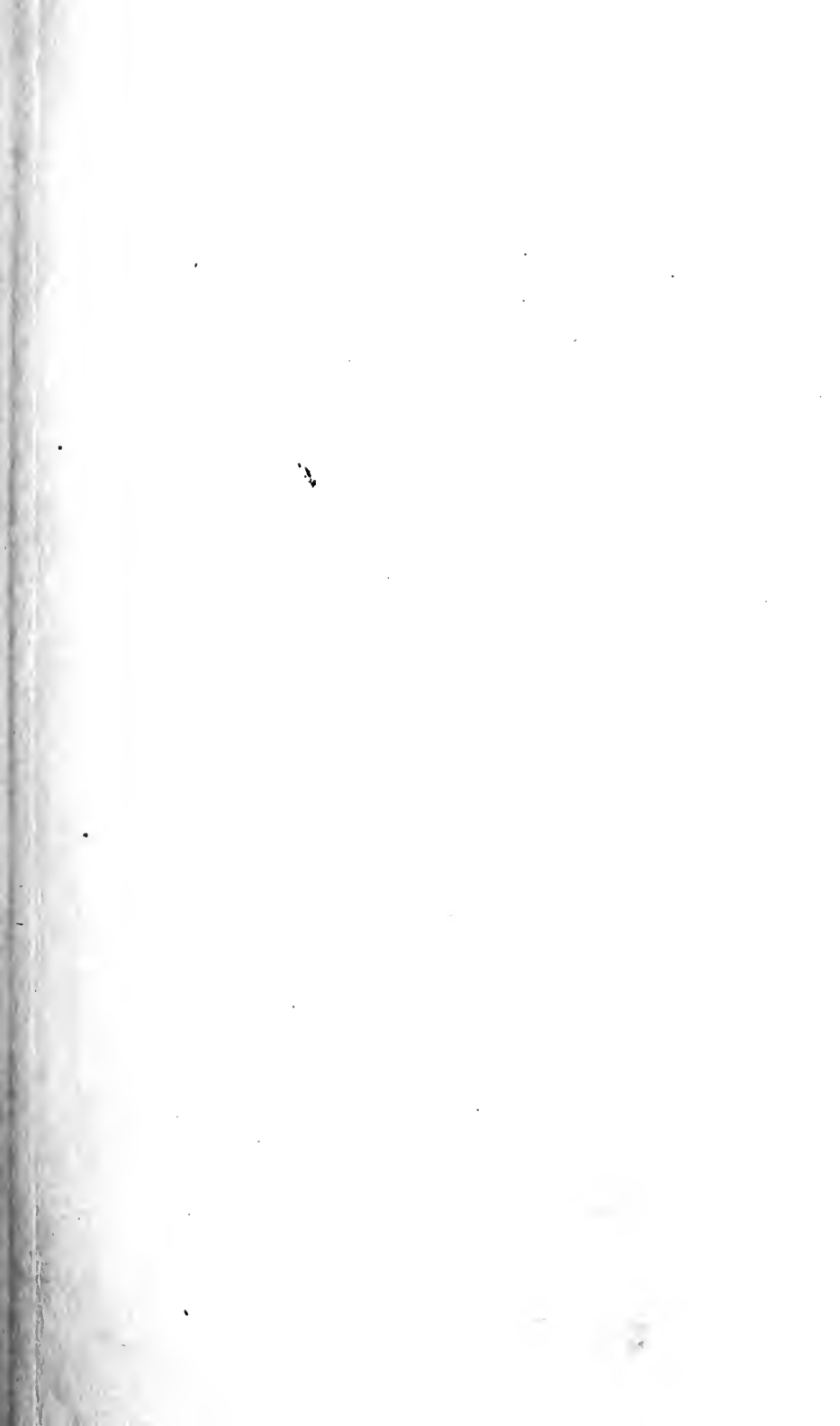
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United States *Vol 2306*
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

SCHAEFER-HITCHCOCK COMPANY, a corpo-
ration,
Respondent.

Transcript of Record

**Upon Petition for Enforcement of an Order of
the National Labor Relations Board**

FILED

JUN 24 1942

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SCHAEFER-HITCHCOCK COMPANY, a corporation,
Respondent.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Nineteenth Region
Case No. XIX-C-896

In the Matter of
SCHAEFER-HITCHCOCK COMPANY
and

LUMBER AND SAWMILL WORKERS UNION,
LOCAL NO. 2614, chartered by the UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, affiliated with the
AMERICAN FEDERATION OF LABOR.

COMPLAINT

It having been charged by Lumber and Sawmill Workers Union, Local No. 2614, that Schaefer-Hitchcock Company, (herein called the Respondent), has engaged in, and is engaging in, unfair labor practices as set forth and defined in the National Labor Relations Act, 49 Stat. 449, (herein called the Act), the National Labor Relations Board by its Regional Director for the Nineteenth Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 2, as amended, hereby alleges as follows:

I.

Respondent is, and at all times herein mentioned has been, a corporation organized under and exist-

ing by virtue of the laws of the State of Idaho with its principal office at Sandpoint, Idaho. Respondent owns and operates pole yards and processing plants at Priest River, Idaho, (herein called Priest River Plant), and at Bovill and Sandpoint, Idaho, and at Minneapolis, Minnesota, where it is engaged in the manufacturing, processing, and sale of poles and piling.

II.

A substantial portion of the raw materials, supplies, and equipment used by the respondent in the operation of its Priest River Plant are purchased, shipped, and transported from, into and through States of the United States other than the State of Idaho to the said Priest River Plant, and the greater portion of the products manufactured and processed by it at its Priest River Plant are sold, shipped, and transported from said plant to, into and through States of the United States other than the State of Idaho.

III.

Lumber and Sawmill Workers Union Local No. 2614, (herein called the Union), chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

On or about March 19, 1941, the Respondent discharged Clifford Damschen from its employ at its

Priest River Plant, and at all times since said date has refused and now refuses to reinstate said employee, because of his membership in and activity on behalf of the Union. By said discharge and refusal to reinstate said employee, Respondent has discriminated and is discriminating in regard to hire and tenure of employment, and has discouraged and is discouraging membership in the Union, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

V.

Respondent, by its officers, agents, and employees, to-wit, Pat Conley, Con Wear, and others well known to Respondent, at various times in February and March of 1941, while engaged in the operation of its Priest River Plant, questioned certain of its employees concerning their membership in the Union and made disparaging remarks about the Union and other labor organizations. On or about February 15, 1941, Respondent by its officers, agents, and employees mentioned above, and others well known to Respondent, caused, instructed, and encouraged a meeting of its employees to be held at which time the aforesaid officers, agents, and employees advised respondent's employees that no benefit would be derived from membership in the Union, that Respondent's employees should not join the Union, that Respondent would close its plant or curtail operations if the employees joined or

were active in the Union, and made other statements derogative to the Union.

VI.

By the acts and statements set forth and described in Paragraphs IV, and V, herein, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

VII.

The activities of respondent as set forth and described in Paragraphs IV, and V, herein, occurring in connection with the operations of Respondent as described in Paragraphs I, and II, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States of the United States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

VIII.

The aforesaid acts of Respondent as set forth and described above constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the said Act.

Wherefore, the National Labor Relations Board, by its Regional Director for the Nineteenth Region on this 27th day of August, 1941, issues its Complaint against Schaefer-Hitchcock Company, Respondent herein.

THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Nineteenth Region, 407 U. S. Courthouse,
Seattle, Washington.

[Title of Board and Cause.]

ANSWER.

For its answer to the complaint herein, Schaefer-Hitchcock Company, therein called the respondent, admits, denies and alleges as follows:

I.

Respondent admits the allegations of Paragraph I of the complaint.

II.

Respondent admits the allegations of Paragraph II of the complaint.

III.

Respondent is without knowledge with respect to the allegations contained in Paragraph III of the complaint.

IV.

Answering Paragraph IV of the complaint, respondent denies that on or about March 19, 1941, or

at any other time or at all the respondent discharged Clifford Damschen from its employ at its Priest River plant because of his membership in and activity on behalf of the Union, and denies that at all times since said date or at any time since said date, or at all, respondent has refused or now refuses to reinstate said employee because of his membership in or activities on behalf of the Union; denies that by said discharge and refusal to reinstate said employee, or by said discharge or refusal to reinstate said employee, or by anything else, or at all, respondent has discriminated or is discriminating in regard to hire and tenure of employment, or has discouraged or is discouraging membership in the union, or thereby has engaged in or is engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

V.

Answering Paragraph V of the complaint, respondent denies that respondent, by its officers or agents or employees, to-wit: Pat Conley or Con Wear or others well known to respondent, or by anyone else or at all, at various times in February and March of 1941, or at any time or at all, while engaged in the operation of its Priest River plant or otherwise, questioned certain of its employees concerning their membership in the Union or made disparaging remarks about the Union or other labor organizations; denies that on or about February 15,

1941, or at any time or at all, respondent, by its officers or agents or employees mentioned above, or others well known to respondent, or by anyone else or at all, caused or instructed or encouraged a meeting of its employees to be held, or that at said time or any time the aforesaid officers or agents or employees advised respondent's employees that no benefit would be derived from membership in the Union, or that respondent's employees should not join the Union, or that respondent would close its plant or curtail operations if the employees joined or were active in the Union, or that they or any of them made other statements derogative to the Union.

VI.

Answering Paragraph VI of the complaint, respondent denies that by the acts and statements set forth and described in Paragraphs IV and V of the complaint, or by any acts or statements, respondent has interfered with or restrained or coerced, or is interfering with or restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, or thereby has engaged in or is engaging in unfair labor practices within the meaning of Section 8, subsection (1), of the Act.

VII.

Answering Paragraph VII of the complaint, respondent denies that the activities of respondent as set forth and described in Paragraphs IV and V of

sions of his personal opinion, and did not represent the attitude of respondent and its officers.

Wherefore, respondent prays that the complaint herein be dismissed.

SCHAEFER-HITCHCOCK
COMPANY,

By J. E. SCHAEFER,
President.

Respondent;

Post Office Address:

Sandpoint, Idaho.

C. H. POTTS,

Attorney for Respondent;

Post Office Address:

P. O. Box 448,

Coeur d'Alene, Idaho.

State of Idaho

County of Bonner—ss.

J. E. Schaefer, being first duly sworn, on oath deposes and says: That he is an officer, to-wit, President, of Schaefer-Hitchcock Company, a corporation, respondent in the above entitled matter, and makes this verification for and on behalf of said respondent, and is duly authorized so to do; that he has read the within and foregoing Answer, and knows the contents thereof, and that he believes the facts therein stated to be true.

J. E. SCHAEFER.

Subscribed and sworn to before me this 2nd day of Sept., A. D. 1941.

(Seal) CARL E. OLSON,
Notary Public in and for the State of Idaho, residing at Sandpoint, Idaho.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENT SCHAEFER-HITCHCOCK COMPANY TO PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW AND PROPOSED ORDER ISSUED BY NATIONAL LABOR RELATIONS BOARD UNDER DATE OF JANUARY 23rd, 1942.

Now comes Schaefer-Hitchcock Company, the respondent in the above entitled matter, and makes and files its exceptions to the proposed Findings of Fact, proposed Conclusions of Law and proposed Order, issued by the National Labor Relations Board under date of January 23rd, 1942, in case No. C-2002, as follows:

Exception No. 1.

Respondent excepts to the proposed Finding on page 3 reading: "The respondent moved swiftly to counteract this nascent activity" on the ground that said proposed Finding is not supported by evidence and is directly contrary to the undisputed evidence in the case to the effect that neither respondent nor

any of its officers had any knowledge of the alleged union activity prior to March 19, 1941, and that respondent and its officers were not antagonistic to the Union or opposed to labor unions in general and had no objection to its employees at the Priest River, Idaho, plant joining a labor union or engaging in union activities.

Exception No. 2.

Respondent excepts to the proposed Finding on page 3 to the effect that Con Wear was one of the respondent's supervisory employees and the Findings on said page reading: "We find Con Wear to be a supervisory employee and, as such, the respondent is responsible for his acts", for the reason that said proposed Findings are not supported by evidence and are directly contrary to the undisputed evidence in the case to the effect that Con Wear was an ordinary employee in the Priest River plant who merely transmitted the orders of the plant foremen to the employees.

Exception No. 3.

Respondent excepts to the proposed Findings on Page 5 to the effect that Damschen "continued to urge the employees to join the union during the remainder of February and in March." And that "likewise, the respondent's countering efforts continued", for the reason that said proposed Findings are not supported by evidence and there is no evidence to justify a Finding that the respondent continued any countering efforts or at any time made

any effort whatever to prevent or interfere with any of its employees joining the union.

Exception No. 4.

Respondent excepts to the proposed Findings contained in the second paragraph on Page 5 reading:

“It is apparent from the entire record, and we find, that the respondent, through its supervisory employees, sought to counteract Damschen’s efforts to interest the employees in union organization and to discourage the employees from exercising their rights under the Act. Wear’s statements to Webb on February 11 and to Damschen, Conkright, and Dempsey after February 15, considered in conjunction with the February 15 meeting, were all intended, we believe, to make clear to the employees that the respondent did not desire that its employees join the union. Thus, the respondent, by seeking to urge its employees to refrain from self-organization, injected itself into a sphere of activity reserved under the Act exclusively to employees”, for the reason that the proposed Findings are not supported by evidence and are based solely on suspicion and conjecture.

Exception No. 5.

Respondent excepts to the proposed Finding contained in the third paragraph on page 5 reading:

“We find that the respondent, by the statements of Con Wear to Webb on February 11, by instigating and holding a meeting on February 15, by the state-

ments of Conlee during this meeting, and by the statements of Con Wear to Damschen about a week thereafter, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act", for the reason that said Finding is not supported by evidence and is contrary to law, and that none of the statements of Con Wear and Conlee interfered with or restrained or coerced respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act, and that there is no evidence proving or tending to prove that respondent instigated or had anything to do with the holding of the meeting on February 15, or that respondent or any of its officers had any knowledge of the said meeting at or prior to the time it was held. That the undisputed evidence shows that said meeting was called and held by the employees in the Priest River plant on their own initiative and without any suggestion or supervision of respondent or any of its officers.

Exception No. 6.

Respondent excepts to the proposed Finding in the second paragraph on page 6 reading: "The reasons advanced by Conlee and by Schaefer on these two separate occasions for the discharge of Damschen are inconsistent" for the reason that said proposed Finding is not supported by evidence and because the evidence is undisputed that Schaefer did not advance any reason for the discharge of Damschen, but stated in effect, that he did not know

that Damschen had been discharged or why the foreman discharged him, but that it might have been because of certain actions of Damschen in operating the tractor to which he had called the foreman's attention.

Exception No. 7.

Respondent excepts to the proposed finding in the second paragraph on page 6 reading: "Schaefer told Damschen, Paddock, and Butler that he told Conlee to discharge Damschen because Damschen was rough on the machinery and he had caught Damschen 'jerking a tractor', and had also said on this occasion that he had heard that Damschen was not satisfied with his wages, and when Damschen admitted this Schaefer said, 'By God, if a man ain't satisfied then he can quit.'" for the reason that said proposed Finding is not supported by evidence and is contrary to the undisputed evidence that Schaefer had not told Conlee to discharge Damschen at all.

Exception No. 8.

Respondent excepts to the proposed Finding in the second paragraph on page 6 reading: "Schaefer's statement that he had told Conlee to discharge Damschen is also at variance with Conlee's unqualified testimony that Conlee had discharged Damschen without consulting anyone or receiving advice or orders from anyone" for the reason that said proposed Finding is not supported

by evidence and is contrary to the undisputed evidence that the foreman discharged Damschen on his own initiative and without consulting anyone.

Exception No. 9.

Respondent excepts to the proposed Finding in the third paragraph on page 6 reading: "In its answer and at the hearing, except for Schaefer's testimony, the respondent maintained that Damschen was discharged in connection with a reduction in force upon the discontinuance of the use of one of its tractors" for the reason that said proposed Finding is not supported by evidence and that respondent alleged in its answer "that on or about March 19, 1941, the use of one of said tractors was discontinued and by reason thereof it became necessary to lay-off one of the tractor drivers and that the foreman of said plant, P. J. Conley, thereupon laid off the said Clifford Damschen, for the reason that his services were no longer required by respondent and his employment was thereupon terminated." And the foreman testified at the hearing that the reason for the discharge of Damschen was that he (the foreman) was discontinuing the operation of one of the tractors and that Damschen's services were no longer required.

Exception No. 10.

Respondent excepts to the proposed Finding in the third paragraph on page 6 reading: "Within 2 weeks after Damschen's discharge, a new tractor was purchased and placed in operation, again in-

creasing the number of tractors in operation to three, the same number in use on March 19," for the reason that said proposed Finding is not supported by evidence.

Exception No. 11.

Respondent excepts to the proposed Finding in the first paragraph on page 7 reading: "It is thus clear that the respondent's contention that Damschen's discharge was necessitated by reason of a reduction in force is contrary to the facts which demonstrate not only that the respondent hired new tractor drivers after March 19, but further that the period immediately preceding and following Damschen's discharge was marked by a large expansion in the respondent's personnel." for the reason that said proposed Finding is not supported by evidence, and that respondent did not allege in its answer, or contend at the hearing that the discharge of Damschen was the result of any general reduction in force at the plant, but alleged and contended and proved that the use of one of the three tractors was discontinued on March 19, 1941, and that by reason thereof it became necessary to lay-off one of the tractor drivers, and the foreman decided to lay-off Damschen.

Exception No. 12.

Respondent excepts to the proposed Finding in the second paragraph on page 7 reading: "Thus, we find that the various reasons advanced by the respondent through its operative heads and in its

answer for the discharge of Damschen are inconsistent with each other, and at variance with the conditions obtaining in the respondent's plant throughout the period of time in question. Upon consideration of all the evidence, we find that these defenses were mere subterfuges designed to conceal the true reason for the discharge which was, in fact, the respondent's desire to remove Damschen from the scene and thus prevent his efforts to organize its employees into the Union from attaining success" for the reason that said proposed Finding is not supported by evidence and the evidence as a whole is insufficient to justify said proposed Finding, or any part thereof, since the foreman testified positively and unequivocally that he did not discharge Damschen because of his membership in the Union or because of any union activity, and his testimony was not contradicted and he was not impeached.

Exception No. 13.

Respondent excepts to the proposed Finding in the third paragraph on page 7 reading: "We find that the respondent, by discharging Clifford Damschen on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," for the reason that said proposed Finding is not supported by evidence, and the

evidence as a whole is insufficient to justify said proposed Finding.

Exception No. 14.

Respondent excepts to the proposed Finding in the fourth paragraph on page 7 reading: "We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce." for the reason that said proposed Finding is not supported by evidence and that the evidence is insufficient to justify said proposed Finding.

Exception No. 15.

Respondent excepts to the proposed Orders to cease and desist from certain unfair labor practices and to offer Clifford Damschen immediate and full reinstatement to his former, or a substantially equivalent, position without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from March 19, 1941, to the date of the offer of his reinstatement, less his net earnings during said period, as set forth under the heading "The Remedy" in

the first two paragraphs on page 8, for the reason that the evidence is insufficient to justify said proposed Orders, or any of them, and said proposed Orders and each of them are contrary to law.

Exception No. 16.

Respondent excepts to proposed Conclusion of Law, No. 2, to the effect that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (3) of the Act by discriminating in regard to the hire and tenure of the employment of Clifford Damschen, thereby discouraging membership in the Union, for the reason that the evidence is insufficient to justify said proposed Conclusion of Law or any Finding in support thereof, and the said proposed Conclusion is contrary to law.

Exception No. 17.

Respondent excepts to proposed Conclusion of Law, No. 3, to the effect that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (1) of the Act, by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, for the reason that the evidence is insufficient to justify said proposed Conclusion or any Findings in support thereof.

Exception No. 18.

Respondent excepts to proposed Conclusion of Law, No. 4, to the effect that the aforesaid unfair

labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act, for the reason that the evidence is insufficient to justify said proposed Conclusion or any Finding in support thereof, or that respondent has engaged in any unfair labor practices.

Exception No. 19.

Respondent excepts to subdivision 1 (a.) of the proposed Order that the respondent and its officers, agents, successors, and assigns shall cease and desist from discouraging membership in the Union or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment, for the reason that the evidence is insufficient to justify said proposed Order or any part thereof, and said proposed Order is contrary to law and is in excess of the power in the National Labor Relations Board.

Exception No. 20.

Respondent excepts to subdivision 1 (b.) of the proposed Order that the respondent and its officers, agents, successors and assigns shall cease and desist from in any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of col-

lective bargaining, or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act, for the reason that the evidence is insufficient to justify said proposed Order, or any part thereof, or to support any Findings that respondent has interfered with any of such rights of its employees, and that said proposed Order is contrary to law.

Exception No. 21.

Respondent excepts to subdivision 2 (a.) of said proposed Order requiring it to offer to Clifford Damschen immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority and other rights and privileges, for the reason that the evidence is insufficient to justify said proposed Order, and it is contrary to law.

Exception No. 22.

Respondent excepts to subdivision 2 (b.) of said proposed Order requiring it to make whole the said Clifford Damschen for any loss of pay he has suffered by reason of his discriminatory discharge by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from the date of his discharge, March 19, 1941, to the date of the offer of reinstatement, less his net earnings during said period, for the reason that the evidence is insufficient to justify said proposed Order, and it is contrary to law.

Exception No. 23.

Respondent excepts to subdivision 2 (c.) of said proposed Order requiring it to post notices to its employees containing the matters set forth in said subdivision 2 (c.), for the reason that the evidence is insufficient to justify said proposed Order, and it is contrary to law.

Exception No. 24.

Respondent excepts to subdivision 2 (d.) of said proposed Order for the reason that it is contrary to law.

Exception No. 25.

Respondent excepts to each and every one of the proposed Findings of Fact, proposed Conclusions of Law, and provisions in the proposed Order, heretofore specifically excepted to, on the ground that the evidence as a whole is insufficient to justify any of said proposed Findings, Conclusions, or provisions in said Order, and that each and all of them are contrary to law.

Exception No. 26.

Respondent, Schaefer-Hitchcock Company, excepts to each and every matter and thing in said proposed Findings of Fact, proposed Conclusions of Law, and proposed Order, whether in the form of Finding of Fact, Conclusion of Law, Remedy, Order, or otherwise finding, holding, or deciding that respondent interfered with, restrained, or coerced its employees in the exercise of the rights guar-

anteed in Section 7 of the Act, or that respondent, by discharging Clifford Damschen, discriminated in regard to his hire and tenure of employment, or interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, or in any way violated the provisions of the National Labor Relations Law.

Respectfully submitted,

C. H. POTTS,

Attorney for Respondent.

Address: Post Office Box 448.

United States of America
Before the National Labor Relations Board
Case No. C-2002

In the Matter of SCHAEFER-HITCHCOCK
COMPANY and LUMBER AND SAWMILL
WORKERS UNION, LOCAL No. 2614, char-
tered by the UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMER-
ICA, affiliated with the AMERICAN FED-
ERATION OF LABOR.

Mr. Charles M. Brooks,
for the Board.

Mr. C. H. Potts,
of Coeur d'Alene, Idaho,
for the respondent.

Mr. Charles A. Paddock,
of Spokane, Wash.,
for the Union.

Mr. Max W. Johnstone,
of counsel to the Board.

DECISION AND ORDER

Statement of the Case

Upon charges duly filed by Lumber and Sawmill
Workers Union, Local No. 2614, chartered by the
United Brotherhood of Carpenters and Joiners of
America, affiliated with the American Federation of
Labor, herein called the Union, the National Labor

Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued its complaint dated August 27, 1941, against Schaefer-Hitchcock Company, Priest River, Idaho, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

With respect to the unfair labor practices the complaint alleged in substance that the respondent (1) discharged Clifford Damschen, one of its employees at its Priest River plant, on or about March 19, 1941, and has at all times since said date refused to reinstate him because of his membership in and activity on behalf of the Union, (2) questioned certain of its employees concerning their membership in the Union and made disparaging remarks about the Union and other labor organizations in February and March 1941, (3) called and held a meeting of its employees on or about February 15, 1941, at which meeting it advised its employees that they would derive no benefit from membership in the Union, that its employees should not join the Union, and that it would close its plant or curtail operations if its employees joined or were active in the Union, and (4) by the foregoing acts interfered with, restrained, and coerced its employees in the

exercise of the rights guaranteed in Section 7 of the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent and the Union. The respondent filed an answer, dated September 2, 1941, denying the allegations of unfair labor practices contained in the complaint, and setting up certain affirmative defenses, herein-after considered.

Pursuant to notice, a hearing was held at Priest River, Idaho, on September 15 and 16, 1941, before P. H. McNally, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case, on motion of the Board's counsel, the complaint was amended to conform to the proof, without objection. The Board has reviewed the rulings of the Trial Examiner on other motions and on objections to the admission of evidence at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On November 7, 1941, the Board, pursuant to Article II, Section 36, of National Labor Relations Board Rules and Regulations—Series 2, as amended, ordered that the proceeding be transferred to and continued before it; that no Intermediate Report be issued by the Trial Examiner; that, pursuant to

Article II, Section 37 (c), of said Rules and Regulations, Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order be issued; and further ordered, pursuant to Article II, Section 37, of said Rules and Regulations, that the parties herein should have the right, within thirty (30) days from the date of said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, to file exceptions thereto and a brief in support thereof, and to request oral argument before the Board within twenty (20) days after the date of said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order.

Thereafter, on November 22, 1941, the respondent filed a brief before the Trial Examiner, which brief the Board has considered.

On January 23, 1942, the Board issued and duly served upon the parties Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order. None of the parties requested oral argument before the Board. The respondent, on February 20, 1942, filed exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order and, on the same date, a brief in support thereof. The Board has considered the exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order and finds no merit in them.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. The business of the respondent

The respondent, Schaefer-Hitchcock Company, is a corporation organized under and existing by virtue of the laws of the State of Idaho, having been incorporated in 1930. It owns and operates plants where it processes poles at Priest River, Bovill, and Sandpoint, Idaho, and at Minneapolis, Minnesota. Its principal office is at Sandpoint, Idaho. The only plant involved herein is its Priest River, Idaho, plant. This plant normally employs from 22 to 70 persons.

The respondent annually uses about 21,680 poles and 105,800 gallons of creosote in its processing operations at its Priest River plant. All of said creosote and approximately 10 percent of said poles are purchased and shipped to its Priest River plant from points outside the State of Idaho. It annually handles or processes poles at its Priest River plant valued at approximately \$148,000, of which approximately 85 percent are sold and shipped to points outside the State of Idaho.

II. The organization involved

Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, is a labor organization which admits employees of the respondent to membership.

III. The unfair labor practices

A. Interference, restraint, and coercion

There was no union activity among the respondent's employees at its Priest River plant prior to early February 1941. At that time, Clifford Damschen, alleged in the Board's complaint to have been discriminatorily discharged on March 19, started to talk to the employees about organizing a union. At about this same time he communicated with the president of the local union at a nearby town, requesting him to send a union organizer to Priest River. On February 10, Belden, a union organizer, came to the plant and inquired for Damschen. Thereupon Damschen went to the outskirts of the plant and conferred with Belden who was waiting there. At this time Damschen signed an application for membership in the Union, and a meeting was arranged for the next night, February 11, to be held at Wright's Hall in Priest River, for the purpose of attempting to organize the employees.

Immediately after returning to the plant from his conference with Belden, Damschen spoke to a number of the employees, telling them of the projected meeting and its purpose. He continued to disseminate news of the meeting the next day, urging the employees to attend, and, by the time set for the meeting, had so approached a majority of them.

The respondent moved swiftly to counteract this nascent union activity. On February 11, Con Wear, one of the respondent's supervisory employees, spoke to John Webb, a production employee, while

they were at work, and asked him what he thought about a union. Webb replied that he thought conditions had come to a point where a union was necessary. This discussion continued and Wear told Webb that it would be better for the employees to leave the Union alone, until Schaefer, the president of the respondent, told them to join a union and what union to join. The foregoing findings with respect to Wear's statements to Webb are based upon Webb's uncontradicted testimony.¹ At the union meeting that night, but two of the respondent's employees, other than Damschen, appeared. It was decided there that a further union meeting, for the same purpose, would be held on February 19.

(1) At the hearing the respondent maintained that Con Wear was not a supervisory employee. Damschen and another Board witness characterized Wear as a "straw boss" and testified that Wear gave orders around the plant and had given them orders. Wear, in his testimony, admitted that he took the place of Pat Conlee, the foreman of the plant, when Conlee was away and had done so at various times theretofore; that he did give orders around the plant; and that he was in complete charge of the plant for a period of 4 or 5 months in 1939 before Conlee came and assumed authority. Conlee testified that Wear may recommend hiring and firing and had done so in the past, and that he utilized Wear to "transmit" orders. We find Con Wear to be a supervisory employee and, as such, the respondent is responsible for his acts. See *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584; *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board v. Jahn & Ollier Engraving Company*, (C. C. A. 7) decided November 26, 1941.

Damschen continued his efforts to organize the employees into the Union, telling them of the meeting set for February 19.

A few days before February 15, however, George Conkright, a checker, Con Wear, and others, approached a majority of the respondent's employees telling them of a meeting to be held on February 15, at the Peterson Hotel in Priest River, for the purpose of discussing the question of unionization. Con Wear invited Damschen to attend. When so invited Damschen asked if a union organizer would be present, and Wear replied that the meeting would be confined to the employees. Wear testified, and we find, that he invited others to attend, including Conlee, the foreman. Conlee testified that he was informed of the purpose of the proposed meeting when he was invited. Wear also admitted in his testimony that it was only after he had heard that a union organizer had been in Priest River that he and Conkright conceived the idea of the meeting and started organizing it.

At this meeting, which was attended by 21 of the respondent's force, which then numbered 25 or 26, Con Wear announced the presence of Foreman Conlee, stating that Conlee had previously had experience with unions "back east," and could tell the employees about them.² At Wear's invitation Conlee spoke to the employees, saying that everything was

(2) Conlee had been superintendent of the respondent's Minneapolis yard from 1930 to 1938, during which time the employees there had struck the yard twice in 1935 or 1936, and again in 1938.

“rosy in the yard”; that he thought they “were getting along swell”; that if the employees had any troubles they should bring them to him; that he had “had experience with unions back east” and “they went out on strike and lost much more than they gained by their strike”; and that unions “can call you out on strike any time they want to and tax you on your dues.” At this point in Conlee’s speech Damschen stated that he understood that members of a local union had the right to vote on the questions of taxation, dues, and strikes. Conlee replied thereto, “Yes, but they can tell you how to vote.” Damschen then suggested that a union organizer should be present in order to give the employees the Union’s viewpoint, and “make it a two-sided discussion.” To this Conlee replied, “that would not be a two-sided discussion. Them fellows have answers for every question you ask. They can paint some beautiful pictures, but I never seen one developed.” During the meeting Damschen stated that he was not satisfied with his wages and that several of the employees were likewise dissatisfied. Toward the end of the meeting, one of the employees suggested that they vote on the question of whether or not they should organize into a union. Damschen objected to such a vote until the employees had an opportunity to hear a union organizer on the subject. Also, during this meeting, Damschen announced that a union meeting would be held on February 19. Conlee and Con Wear, in their testimony, admitted the sub-

stance of the account of the meeting of February 15, above set forth.³

Thereafter, only Damschen, among the respondent's employees, appeared for the Union meeting on February 19. He testified, and we so find, that he continued to urge the employees to join the Union during the remainder of February and in March. Likewise, the respondent's countering efforts continued. About a week after the respondent's meeting of February 15, according to Damschen, Con Wear brought the subject of the Union into a conversation with Damschen, George Conkright, and Fay Dempsey, stating that the employees were getting along pretty well and that he "hated" to see a union go in and "break us up." When Damschen told Wear, at this time, that he was not satisfied with his wages, Wear replied, "Well, I believe we can straighten things out without a union." Damschen's testimony about this conversation, above set forth, was undenied, although Wear and Conkright were

(3) The account of this meeting above set forth is based on the undisputed testimony of Damschen, corroborated by John Webb. There was no essential difference in the testimony given by the Board's and the respondent's witnesses relative to the meeting. Some of the respondent's witnesses indicated that Conlee prefaced his remarks with the thought that the respondent was indifferent to the question of whether or not its employees joined the Union. We find it unnecessary to make a finding on this, for, assuming that Conlee did so preface his other remarks, that would not vitiate the effects of his open attack on the Union and unions generally.

called by the respondent and testified at the hearing. We find that Wear made the statement above attributed to him substantially as testified to by Damschen.

It is apparent from the entire record, and we find, that the respondent, through its supervisory employees, sought to counteract Damschen's efforts to interest the employees in union organization and to discourage the employees from exercising their rights under the Act. Wear's statements to Webb on February 11 and to Damschen, Conkright, and Dempsey after February 15, considered in conjunction with the February 15 meeting, were all intended, we believe, to make clear to the employees that the respondent did not desire that its employees join the Union. Thus, the respondent, by seeking to urge its employees to refrain from self-organization, injected itself into a sphere of activity reserved under the Act exclusively to employees. It is significant to note that whereas the employees attended a meeting arranged by Wear, union meetings called by Damschen were ignored by the employees.

We find that the respondent, by the statements of Con Wear to Webb on February 11, by instigating and holding a meeting on February 15, by the statements of Conlee during this meeting, and by the statements of Con Wear to Damschen about a week thereafter, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. The discharge of Clifford Damschen

Clifford Damschen, the only one of the respondent's employees to apply for membership in the Union and to engage in organizational activity on behalf of the Union, was discharged by the respondent on March 19, 1941. As found hereinbefore, Damschen continued his organizational activity after the respondent's meeting of February 15 into the month of March.

Damschen was first employed by the respondent in 1934, and from 1935 to the date of his discharge worked whenever the Priest River plant operated.⁴ He had performed numerous operations such as hooking chain, working on the skidways, tailing down, sawing on cross-cut saws, working on the vats, decking poles, driving a team, "odd jobs," and driving a tractor, at various times throughout the years since he was first employed by the respondent. Damschen drove the first tractor acquired by the respondent for motive power, in 1937, and continued to drive a tractor thereafter until his discharge, except for very short periods of time when he was temporarily transferred to other tasks.

On March 19, 1941, Conlee handed Damschen two pay checks representing payment in full for his services to the end of that day, and indicated to

(4) Conlee testified that he had never before laid off Damschen except when a majority of the employees were likewise laid off; and that Damschen was the only employee whose services were dispensed with on March 19, 1941.

Damschen that his services were no longer required. Damschen testified, without denial, that when he asked Conlee if his remarks meant that he was not to report for work the next day, Conlee replied, "That is right. We are cutting down the force. We won't be needing you any more."

Damschen immediately referred the matter to Butler, president of the Union, who, with Paddock, a union representative, visited Conlee on March 22, about the discharge. Later in the same day the union officials, accompanied by Damschen, conferred with Schaefer, president of the respondent. The reasons advanced by Conlee and by Schaefer on these two separate occasions for the discharge of Damschen are inconsistent. As established by Damschen's undenied testimony, partially corroborated by Conlee and Schaefer, but in no respect contradicted by any of the respondent's witnesses, Conlee told Paddock and Butler that Damschen was discharged because of a reduction in force, whereas Schaefer told Damschen, Paddock, and Butler that he told Conlee to discharge Damschen because Damschen was rough on the machinery and he had caught Damschen "jerking a tractor." Further, according to Damschen's undenied testimony, Schaefer also said on this occasion that he had heard that Damschen was not satisfied with his wages, and when Damschen admitted this Schaefer said, "By God, if a man ain't satisfied then he can quit." Schaefer's statement that he had told Conlee to discharge Damschen is also at variance with Conlee's unqualified testi-

mony that Conlee had discharged Damschen without consulting anyone or receiving advice or orders from anyone. Damschen also testified without denial, and we find, that he had never been adversely criticised by Conlee, Wear, Schaefer, or anyone else, in connection with his work. Indeed, Conlee testified on cross-examination that Damschen's work as a tractor driver and all of his work was "quite satisfactory," and that he had "nothing in particular" against him.

In its answer and at the hearing, except for Schaefer's testimony, the respondent maintained that Damschen was discharged in connection with a reduction in force upon the discontinuance of the use of one of its tractors. Conlee testified that he had discharged Damschen because one of the three tractors operated by the respondent had worn out. The record shows, however, that the tractor in question had been operated by one Dempsey, and not by Damschen. Moreover, within 2 weeks after Damschen's discharge, a new tractor was purchased and placed in operation, again increasing the number of tractors in operation to three, the same number in use on March 19. Less than 2 months thereafter, when a second shift was added, of the six employees assigned to the operation of tractors, two had been hired after Damschen's discharge. Moreover, one Clyde Wear had been assigned to driving a tractor only 1 week prior to the discharge. The respondent offered no explanation for choosing Damschen for discharge in view of his long experience, nor did it

explain why new men were hired as tractor drivers thereafter, when it was aware that Damschen, an admittedly competent operator, had sought reinstatement.⁵

Furthermore, not only did the respondent hire new tractor drivers following Damschen's discharge, but the respondent also increased greatly its working force after February 15. On that date the re-

(5) The respondent sought to show at the hearing that Damschen had not appeared for work after March 19. It is apparent, however, that Damschen protested his discharge on March 22. In addition, throughout the hearing and its brief before the Trial Examiner, it was the respondent's position that Damschen was discharged on March 19, and we so find. Also, at the hearing, the respondent sought to show that it had no seniority policy in effect at its Priest River plant, and that therefore it could discharge anyone it wished, presumably in connection with a reduction in force. The operative conditions in effect at the respondent's plant, however, do not support the respondent's contention. The uncontradicted testimony shows that the respondent favored employees who had been with it for 2 or more years in assigning work at slack times, and that the respondent had placed in effect in 1940, a vacation-with-pay plan for only those if its employees who had been with it for 2 or more years. Damschen's testimony, likewise uncontradicted, also establishes the fact that the majority of the respondent's employees on March 19 had less service with the respondent than Damschen had. He named four such employees and testified that two of them were performing operations on March 19, which he had performed. We find that these defenses, if such it was intended they be considered, are mere afterthoughts, totally inconsistent with the facts, and without merit.

spondent had approximately 26 employees, on March 19 approximately 35, and on May 15 the respondent added a second shift which raised the number of employees to 70. At the time of the hearing the respondent had approximately 55 employees. It is apparent that Damschen, because of his varied experience with the respondent, was qualified to perform some of the tasks for which these new employees were hired. It is thus clear that the respondent's contention that Damschen's discharge was necessitated by reason of a reduction in force is contrary to the facts which demonstrate not only that the respondent hired new tractor drivers after March 19, but further that the period immediately preceding and following Damschen's discharge was marked by a large expansion in the respondent's personnel.

At the hearing, when asked on cross-examination why he had not permitted Damschen to run a tractor after March 19, Foreman Conlee replied, "Well, I just did not want Damschen, I guess was the reason," and when asked if the reason why he had not offered Damschen employment thereafter was that Damschen had taken matters up with the Union, Conlee replied, "I don't think that was a particular reason. I think it may have had some bearing on it." Thus, we find that the various reasons advanced by the respondent through its operative heads and in its answer for the discharge of Damschen are inconsistent with each other, and at variance with the conditions obtaining in the re-

spondent's plant throughout the period of time in question. Upon consideration of all the evidence, we find that these defenses were mere subterfuges designed to conceal the true reason for the discharge which was, in fact, the respondent's desire to remove Damschen from the scene and thus prevent his efforts to organize its employees into the Union from attaining success.

We find that the respondent, by discharging Clifford Damschen on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom, and to take certain

affirmative action which we deem necessary to effectuate the policies of the Act.

We have found that the respondent, by discharging Clifford Damschen, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union. We shall, therefore, order the respondent to offer Clifford Damschen immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from March 19, 1941, to the date of the offer of reinstatement, less his net earnings⁶ during said period.

Upon the basis of the above findings of fact and

(6) By "net earnings" is meant earnings less expenses such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for the respondent's discrimination against him and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corp. v. N. L. R. B.* 311 U. S. 7.

upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Clifford Damschen, thereby discouraging membership in the Union, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the

National Labor Relations Board hereby orders that the respondent, Schaefer-Hitchcock Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Clifford Damschen immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority and other rights and privileges;

(b) Make whole the said Clifford Damschen for any loss of pay he has suffered by reason of his discriminatory discharge by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from the date of his discharge, March 19, 1941, to the date of the offer of reinstatement, less his net earnings during said period;

(c) Immediately post in conspicuous places in and about its plant at Priest River, Idaho, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; (2) that it will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership or activity in that organization;

(d) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 12 day of
March 1942.

HARRY A. MILLIS,
Chairman,
WILLIAM M. LEISERSON,
Member,
GERARD D. REILLY,
Member,
(Seal) NATIONAL LABOR
RELATIONS BOARD.

In the United States Circuit Court of Appeals
for the Ninth Circuit

10118

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

SCHAEFER-HITCHCOCK COMPANY,
Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to
the National Labor Relations Act (Act of July 5,
1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.),

respectfully petitions this Court for the enforcement of its order against respondent, Schaefer-Hitchcock Company, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Schaefer-Hitchcock Company and Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, Case No. C-2002."

In support of this petition, the Board respectfully shows:

(1) Respondent is an Idaho corporation, engaged in business in the State of Idaho, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, a complaint, respondent's answer to the complaint, hearing for purpose of taking testimony and receiving other evidence, order transferring case to the Board, proposed findings of fact, proposed conclusions of law, and proposed order, respondent's exceptions thereto, the Board, on March 12, 1942, duly stated its findings of fact, conclusions of law, and order directed to respondent Schaefer-Hitchcock Com-

pany, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Schaefer-Hitchcock Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guar-

anteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Clifford Damschen immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority and other rights and privileges;

(b) Make whole the said Clifford Damschen for any loss of pay he has suffered by reason of his discriminatory discharge by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from the date of his discharge, March 19, 1941, to the date of the offer of reinstatement, less his net earnings during said period;

(c) Immediately post in conspicuous places in and about its plant at **Priest River, Idaho**, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; (2) that it will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters

and Joiners of America, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership or activity in that organization;

(d) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On March 12, 1942, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to C. H. Potts, Esquire, respondent's attorney in Coeur d'Alene, Idaho.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court the transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said

order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS
BOARD

By ERNEST A. GROSS

Associate General Counsel

Dated at Washington, D. C., this 23rd day of April, 1942.

District of Columbia—ss.

Ernest A. Gross, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information, and belief.

ERNEST A. GROSS

Associate General Counsel

Subscribed and sworn to before me this 23rd day of April, 1942.

(Seal)

DANIEL T. GHENT, JR.

Notary Public, District of Columbia

My commission expires August 31, 1944.

[Endorsed]: Filed Apr. 27, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Schaefer-Hitchcock Company, the respondent in the above entitled proceeding, for its Answer to the Petition for Enforcement of An Order of the National Labor Relations Board, filed in this Court, states:

(1) Admits that respondent is an Idaho corporation, engaged in business in the State of Idaho, within this judicial circuit, where the alleged unfair labor practices occurred, but denies that said alleged unfair labor practices did occur, or that respondent has engaged in or is engaging in unfair labor practices within the meaning of Section 8 (1) and/or (3) of the Act.

(2) Admits that upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof, certified by the Board and filed with this Court, the Board on March 12, 1942, stated its Findings of Fact, Conclusions of Law, and Order, directed to respondent Schaefer-Hitchcock Company, and its officers, agents, successors and assigns, and that the Order set forth in paragraph (2) of said Petition is the order which was made by the Board on March 12, 1942, in said matter.

Respondent denies that the Board duly stated said findings of fact or conclusions of law or order for the reasons hereinafter set forth and alleged. Denies that the Board's findings of fact are fully supported by substantial evidence or are supported by evidence, and denies that the Board's Order is wholly valid and proper under the Act, or is valid or proper in any respect.

(3) Respondent admits that on March 12, 1942, the Board's decision and order was served upon respondent as alleged in paragraph (3) of the Petition.

Further answering said Petition, and as cause why the Petition should not be granted and the enforcement thereof denied, and why said Order should be set aside respondent alleges:

(1) That the said Order of the National Labor Relations Board as set forth and contained in paragraph (2) of said Petition is wholly invalid and improper under the Act, and is contrary to law in that said Order is based on findings of fact which were not supported by substantial evidence.

(2) That the evidence is insufficient to support the findings of fact set forth in respondent's Exceptions to Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, filed with the Board and made a part of the record in this proceeding, which Exceptions are hereby referred to and made a part hereof as fully as if set forth herein at length.

(3) That the evidence is insufficient to support or justify the conclusions of law set forth and contained in respondent's Exceptions to Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order referred to in paragraph (2) hereof.

(4) That the evidence is insufficient to support or justify those portions of said Order of the National Labor Relations Board set forth and contained in respondent's Exceptions to Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order referred to in paragraph (2) hereof.

(5) That the evidence is insufficient to support any finding or conclusion of the National Labor Relations Board finding, holding or deciding that respondent interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, or that respondent, by discharging Clifford Damschen, discriminated in regard to the hire and tenure of the employment, or interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, or in any way violated the provisions of the National Labor Relations Law, and any such finding or conclusion is contrary to law.

(6) That the findings of fact, conclusions of law and order of the National Labor Relations Board made in this proceeding deny to respondent and to its employees the freedom of speech guaranteed by

the First Amendment to the Constitution of the United States, and are in conflict with that clause of said First Amendment which provides that Congress shall make no law abridging the freedom of speech or of the press.

Wherefore, respondent prays for a decree of this Court that said Petition for Enforcement of An Order of the National Labor Relations Board be dismissed and that the Order of the National Labor Relations Board set forth in said Petition be set aside and enforcement thereof denied.

Dated at Coeur d'Alene, Idaho, this 7th day of May, A. D. 1942.

C. H. POTTS

Attorney for Respondent,

Residence and Post Office

Address: Coeur d'Alene, Idaho

State of Idaho,

County of Kootenai—ss.

C. H. Potts, being first duly sworn, on oath deposes and says: That he is the attorney for Schaefer-Hitchcock Company, the respondent in the above entitled proceeding; that he is authorized to and does make this verification for and on behalf of said respondent; that he has read the foregoing answer and has knowledge of the contents thereof; and that the statements made therein are true to

the best of his knowledge, information, and belief.

C. H. POTTS

Subscribed and sworn to before me this 7th day of May, A. D. 1942.

(Seal) WILLIAM McFARLAND

Notary Public in and for the State of Idaho,
residing at Coeur d'Alene, Idaho.

My commission expires July 29, 1942.

AFFIDAVIT OF MAILING

State of Idaho,

County of Kootenai—ss.

Mary McCartney, being first duly sworn, on oath deposes and says: That on the 7th day of May, A. D. 1942, she sent by registered mail, through the United States Post Office in Coeur d'Alene, Idaho, a copy of the within Answer to Petition for Enforcement of an Order of the National Labor Relations Board in the above entitled matter, addressed to Mr. Ernest A. Gross, Associate General Counsel, National Labor Relations Board, Shoreham Building, Washington, *C. D.*, and that postage and registry fees were paid and a return receipt was requested.

That at the time said copy was sent there was a regular communication by mail between Coeur d'Alene, Idaho, where affiant resides, and Washington, D. C., and that affiant made such service at the

request of C. H. Potts, attorney for respondent.

MARY McCARTNEY

Subscribed and sworn to before me this 7th day of May, A. D. 1942.

(Seal) C. H. POTTS

Notary Public in and for the State of Idaho,
residing at Coeur d'Alene, Idaho.

[Endorsed]: Filed May 11, 1942. Paul P. O'Brien,
Clerk.

[Title of Board and Cause.]

REPORTER'S TRANSCRIPT

City Hall,
Priest River, Idaho,
September 15, 1941.

The above-entitled matter came on for hearing at ten o'clock a.m., pursuant to notice, as follows:

Before: P. H. McNally, Trial Examiner.

Appearances:

Charles M. Brooks, Esq., 407 U. S. Court House, Seattle, Washington, appearing for National Labor Relations Board, Nineteenth Region.

C. H. Potts, Esq., Coeur d'Alene, Idaho, appearing for Schaefer-Hitchcock Company.

Charles A. Paddock, Esq., 737 East 34th Street, Spokane, Washington, appearing for the United Brotherhood of Carpenters and Joiners of America, affiliated with A F of L. [1*]

[*Page numbering appearing at top of page of original Reporter's Transcript.]

Proceedings

Trial Examiner McNally: Are you ready, gentlemen?

Mr. Brooks: Yes.

Mr. Potts: Yes, we are ready.

Trial Examiner McNally: The hearing will come to order. Please do not smoke in the hearing room. We will have recesses from time to time so that anyone who desires to smoke may step outside and do so. This is a formal hearing before the National Labor Relations Board in the matter of the Schaefer-Hitchcock Company and Lumber and Sawmill Workers Union Local 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, being case No. XIX-C-896. The trial examiner appearing for the National Labor Relations Board is P. H. McNally. Counsel will please state their appearances for the record.

Mr. Brooks: Charles M. Brooks, appearing for the National Labor Relations Board.

Mr. Potts: C. H. Potts, appearing for the respondent, Schaefer-Hitchcock Company, post office address, Coeur d'Alene, Idaho.

Mr. Paddock: Charles A. Paddock, for the United Brotherhood of Carpenters & Joiners of America, affiliated with the A F of L.

Trial Examiner McNally: I wish to inform all parties [4] that the official reporter makes the only official transcript of these proceedings. Citations

in briefs or arguments based upon the record directed to the trial examiner or to the Board, must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing, and if so, the party desiring the correction will submit the suggested correction to the other party or parties in writing. When this has received the written approval of the other parties it will be submitted to the trial examiner. In event the parties are unable to agree upon proposed corrections, the trial examiner will then consider motions to correct the record, or may, upon his own motion, order certain corrections in the transcript. If the parties have been unable to agree upon such corrections before the close of the hearing but have entered into a stipulation concerning such matters after the close of the hearing but prior to the receipt of the intermediate report, such stipulations or motions with respect to corrections in the transcript or record should be addressed to the trial examiner in care of the chief trial examiner in Washington. After receipt of the intermediate report all such communications should be directed to the Board itself, [5] inasmuch as the trial examiner's connection with the case ceases upon the filing of his intermediate report with the regional director, at which time the Board transfers the case to itself.

This is a formal hearing, and I request that you maintain the decorum that accompanies judicial proceedings.

Concise statements of the reasons for motions or objections will be permitted. Arguments with respect to the same will not ordinarily appear in the record or the official transcript. If counsel desire to argue objections, they will please so indicate to the trial examiner, who may, if he deems argument necessary, go "off the record" for the purpose of hearing such argument. It is to be understood that the official reporter takes everything that is said during the hearing by counsel, by witnesses and the trial examiner unless the trial examiner orders an "off the record" discussion. All requests from counsel to go off the record are to be directed to the trial examiner and not to the official reporter.

The trial examiner will allow an automatic exception to all adverse rulings during the course of the hearing, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Four copies of all pleadings admitted during the hearing are to be filed with the trial examiner. [6]

At the close of the hearing the parties may, if they so desire, argue orally before the trial examiner. Similarly, they may file briefs with the trial examiner within fifteen days from the close of the hearing. Such briefs shall be directed to the trial examiner in care of the chief trial examiner in Washington.

I make this announcement at this time in order that the parties may plan their case and schedule accordingly.

You may proceed, Mr. Brooks.

Mr. Brooks: Mr. Examiner, at this time I request the reporter to mark certain papers contained in this folder, which are the formal papers and pleadings thus far filed in this proceeding. I would request that this be marked as Board's Exhibit 1 and subdivided as follows: 1-A, a charge of the Lumber and Sawmill Workers Union, Local 2614; 1-B, the complaint, notice of hearing and instructions relative to duplicate exhibits, all issued by the regional director for the 19th Region; 1-C, the affidavit as to service of the charge, complaint, notice of hearing and rules and regulations, Series 2, as Amended; 1-D, the answer filed by respondent Schaefer-Hitchcock Company; 1-E, the proof of service of the answer; 1-F, a certified copy of the order designating P. H. McNally to act as trial examiner in this case.

I offer Board's Exhibit 1 as indicated into evidence, [7] and have here a duplicate of each of the exhibits described.

(File referred to was marked as Board's Exhibit 1, A to F, inclusive, for identification.)

Trial Examiner McNally: Any objection?

Mr. Potts: No.

Trial Examiner McNally: Board's Exhibits 1-A to 1-F will be received.

(File heretofore marked for identification as Board's Exhibit 1, A to F, received in evidence.)

Mr. Brooks: May we be off the record?

Trial Examiner McNally: Off the record.

(Whereupon there was some discussion off the record.)

Mr. Brooks: I now request the reporter to mark this document entitled "Stipulation" as Board's Exhibit 2, and will at this time offer Board's Exhibit 2 into evidence with the request that we may be permitted to withdraw it after it is in the office of the reporter in Seattle for the privilege of making additional copies in the office of the Board in Seattle.

Trial Examiner McNally: Off the record.

(Whereupon there was some discussion off the record.)

Trial Examiner McNally: Is there any objection to the offer of Board's Exhibit 2 for identification?

Mr. Potts: We have no objection.

Trial Examiner McNally: Board's Exhibit No. 2 will be received.

(Document referred to was marked as Board's Exhibit No. 2 for identification and received in evidence.) [8]

BOARD EXHIBIT No. 2

[Title of Board and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between Schaefer-Hitchcock Company, through its attorney, C. H. Potts, and Charles M. Brooks, Regional Attorney for the National Labor Relations Board, 19th Region, that the following facts may be received in evidence in the within case, and given the same effect as if they were testified to *be* competent witnesses; it is further agreed that neither party is precluded from offering additional evidence concerning the business of respondent in this case:

(1) Schaefer-Hitchcock Company, respondent herein is, and at all times since 1930 has been, a corporation incorporated and existing under the laws of the State of Idaho, with its principal office at Sandpoint, Idaho. Respondent is engaged principally in the business of manufacturing and processing poles. In the conduct of its business, respondent owns and operates manufacturing and processing plants at Priest River, Bovill and Sandpoint, Idaho and at Minneapolis, Minnesota.

(2) In the conduct and operation of its Priest River plant, respondent uses annually approximately 21,680 poles, and approximately 105,800 gallons of creosote. All of said creosote is purchased and shipped from points outside the State of Idaho to the Priest River plant. Approximately ten per cent (10%) of said poles are purchased and shipped

from points outside the State of Idaho to the Priest River plant. Approximately 30,000 poles are annually handled or processed at respondent's Priest River plant, of which amount approximately eighty-five per cent (85%) is sold and shipped to points outside the State of Idaho from respondent's Priest River plant. The approximate value of the poles sold at the Priest River plant annually is \$148,000.00.

(3) The number of employees at respondent's Priest River plant varies from twenty (20) to seventy (70). There are presently employed at said Priest River plant fifty-five (55) employees.

(4) Lumber and Sawmill Workers Union, Local 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2, Subsection (5) of the National Labor Relations Act.

Dated at Priest River, Idaho this 15th day of September, 1941.

SCHAEFER-HITCHCOCK COMPANY

By: C. H. POTTS,

Attorney

CHAS. M. BROOKS,

Regional Attorney,

National Labor Relations Board,

19th Region.

Trial Examiner McNally: Is there any objection to the application of Mr. Brooks to withdraw the exhibit for purposes of making necessary copies for all parties?

Mr. Potts: No objection.

Trial Examiner McNally: The permission will be granted to Mr. Brooks as requested.

Mr. Brooks: Mr. Examiner, it will be noted that the charge which is in evidence as Board's Exhibit 1-A varies as to the caption from the caption on the complaint as to the true name of the respondent. In the caption of the charge it is "Schaeffer-Hitchcox Pole Company". I move at this time to amend the caption of the charge to conform with the caption as it appears in the complaint.

Trial Examiner McNally: Any objection?

Mr. Potts: No.

Trial Examiner McNally: The motion will be granted.

Mr. Brooks: I call Mr. Clifford Damschen.

CLIFFORD DAMSCHEN

a witness called by and on behalf of the Board, was duly sworn and was examined and testified as follows:

Direct Examination

Q. (By Mr. Brooks) State your name.

A. Clifford Damschen.

Q. Spell it.

(Testimony of Clifford Damschen.)

A. D-a-m-s-c-h-en (spelling). [9]

Q. Are you the Clifford Damschen named in the complaint in this matter? A. I am.

Q. What is your mailing address, Mr. Damschen?

A. Priest River, Idaho, Route 1.

Q. Have you formerly been employed by the Schaefer-Hitchcock Company, respondent in this case? A. Yes.

Q. When did you first go to work for the respondent?

A. I first went to work for them in the spring of 1934.

Q. How long did you work approximately after you went to work in the spring of 1934?

A. Approximately a month.

Q. And what happened then?

A. I was laid off along with the majority of the rest of the crew.

Q. Was there a reduction of the operations?

A. Yes.

Q. Was that at the respondent's pole yard here in Priest River? A. It was.

Q. What was your work at that time; that is, in 1934, until you were laid off?

A. Common labor, as near as I can remember; hooking chain, I believe. [10]

Q. Can you describe for us just briefly and generally the type of operations that are carried on at the pole yard here?

(Testimony of Clifford Damschen.)

A. I don't know just how to go about it to explain it.

Q. Just tell us what the employees there do at the yard?

A. Well, they are driving team and hooking chain. Of course at that time there was no tractor, but now there is tractors,—driving and tailing down.

Q. In the tractor driving job does the tractor hook onto and grab the poles with the chain and drag them to the place where they are wanted?

A. It does.

Q. Now, when did you next go back to work for the company after your layoff in the spring of 1934?

A. In the spring of 1935.

Q. What was your job when you went back in the spring of 1935?

A. Odd jobs such as hooking chain and working on skidways.

Q. By hooking chain, you mean hooking a chain onto the logs or poles, is that right?

A. That is right, for the teams, yes.

Q. When did you last work for the respondent?

A. March 19, 1941.

Q. What was your job at that time?

A. Driving tractor. [11]

Q. How long had you been driving a tractor?

A. Approximately four years.

Trial Examiner McNally: I understand that the

(Testimony of Clifford Damschen.)

witness worked for the company continuously from the spring of 1935?

Mr. Brooks: I am going to ask him that right now.

Trial Examiner McNally: Proceed.

Q. (By Mr. Brooks) Did you, Mr. Damschen, work for the respondent company continuously from 1935 until March 19, 1941?

A. There were short layoffs. I was dependent on their payroll entirely.

Q. From the time you started driving tractor, which you stated was about four years prior to March 19, 1941, were you laid off at any time when the pole yard was operated?

A. Not if it was operated with any force at all.

Q. In other words, if the pole yard was handling poles, did you work? A. Yes.

Q. Were there occasions when you were laid off from the tractor job and placed on other jobs?

A. Yes.

Q. What was your rate of pay when you went to work for the respondent in the spring of 1935, if you remember?

Mr. Potts: Objected to as immaterial.

Trial Examiner McNally: He may answer. [12]

A. I would have to guess at it more or less. I believe it was about forty cents.

Q. What was your rate of pay on March 19, 1941? A. 60 cents.

Q. How long had you been receiving 60 cents?

(Testimony of Clifford Damschen.)

A. Since the first of 1941, January 1.

Q. And what was your rate of pay immediately prior to the first of 1941? A. 55 cents.

Q. Mr. Damschen, prior to January 1941, to your knowledge, had there been any union activity among the employees of the respondent at Priest River? A. No.

Q. Prior to January, 1941, had you yourself engaged in any kind of activity on behalf of a labor organization?

A. At that time not directly in the yard. I had been talking to a friend of mine that was in the organization and was attempting to get him to send someone up here, but I had not talked to anyone in the yard at that time.

Q. When did you start talking to this friend of yours?

A. Sometime in January, I would say.

Q. 1941?

A. 1941. No, 1940. Pardon me, yes, 1941.

Q. You say you requested this friend to get someone to come up here? [13]

A. Yes.

Q. What do you mean? Get a labor organizer here? A. An organizer, yes.

Q. Did anything happen as a result of your conversations with this friend of yours?

A. It did. On February 10 an organizer came into Priest River.

Q. Who was this man?

(Testimony of Clifford Damschen.)

A. Ed Belden, from Spokane.

Q. Beldon?

A. Belden, B-e-l-d-e-n (spells it).

Q. And that was on February 10, 1940?

A. Yes.

Q. Was this man or friend of yours that you had been talking to, a member of any organization at that time, if you know? A. Yes, he was.

Q. Where was he a member?

A. He was a member of the Newport, Local 2614 at Newport, Washington.

Q. And Newport is about seven miles from here, isn't it? A. Yes.

Q. What happened on the 10th of February when Mr. Belden came in?

A. He came down to the outskirts of the yard and inquired [14] for me, so I understand, and I was pointed out by a fellow worker, and he talked to me and said that he had understood I wanted him to come up and wanted to know if I could not help him call the boys together to hold a meeting that night.

Q. Where did you have this conversation with Mr. Belden on February 10?

A. At the outskirts of the Schaefer-Hitchcock pole yard.

Q. And what, if anything, did you do that day after you had talked to Mr. Belden?

A. I went around and tried to catch part of the crew or as many of the boys as possible, but most

(Testimony of Clifford Damschen.)

of them had gone home. I talked to three or four, and we decided that it was not enough to bother with. So we agreed that I would tell the boys next day, and we would attempt to hold a meeting on the 11th.

Q. And as I understand, you talked to several of the employees of the respondent on the afternoon of February 10 around town? A. Yes.

Q. And did you on that day make any effort or take any steps toward becoming a member of Local 2614?

A. I did. I signed up on the 10th.

Q. Was that an application for membership in the local? A. That was. [15]

Q. What, if anything, happened on the following day, which would be February 11, with respect to your connection with Mr. Belden?

A. I talked to several of the boys the following day and told them there would be a meeting at 7 o'clock that night in Wright's hall.

Q. Wright's? A. Wright's hall.

Q. And that is located in the town of Priest River? A. Yes.

Q. Was there a meeting that night?

A. There was.

Q. Were you present? A. Yes.

Q. After this meeting of February 11 did you continue to talk to the employees about unions and labor organizations? A. Yes, I did.

Q. Did you just talk to a few of them or was

(Testimony of Clifford Damschen.)

that general? Did you talk to a number of them?

A. Not the entire crew, of course; the majority of them.

Q. You say you talked to the majority of them?

A. Yes.

Q. I would like to direct your attention to February 15, 1941. Were you invited on that day to attend a meeting of the employees of the respondent? [16]

A. I was.

Q. Who invited you? A. Con Wear.

Q. Con Wear? A. Yes.

Q. That is spelled "W-e-a-r"?

A. I think so.

Q. Who is and who was Con Wear at that time?

A. He was what I call the straw boss.

Q. What did he do? He worked at the pole yard, I presume?

A. He worked at the pole yard, yes.

Q. What did he do at the pole yard?

A. Mostly going around directing the crew.

Q. Did he ever give you orders? A. Yes.

Q. Who at that time, in February, 1941, was in charge of the yard, the entire yard?

A. Pat Conlee.

Q. Pat Conlee (spells it)? A. Yes.

Q. Were there any occasions to your knowledge when Pat Conlee was away from the yard for a day or more? A. Yes.

Q. Who, if anyone, replaced him?

A. Con Wear. [17]

(Testimony of Clifford Damschen.)

Q. Where did Con Wear speak to you on February 15 with reference to this meeting?

A. On the main street in Priest River.

Q. Was there anyone else present? A. No.

Q. Tell what Wear said to you and what you said to him on that occasion?

A. He came up to me and said, "Clif, we are going to have a little meeting at the Peterson Hotel at 4 o'clock." He said, "And I would like to have you attend. We are going to discuss this union thing and decide whether to join a union or not." I asked him who was going to be there to represent the union and he said this wasn't going to be that kind of a meeting; it was just going to be a friendly chat among the workers to see what they thought about unions. I told him I did not believe that would be a very appropriate meeting without someone to discuss the union, because none of the boys really knew what a union was, and he said that,—I suggested having an organizer there to tell what the union was, and that we would have one up in a few days and he could get him to testify for us. And he said, "Well, you can have your union men if you want them, but this is just going to be a friendly chat among the workers."

Q. Did you have reference to any particular individual when you stated to Mr. Wear that you were going to have an [18] organizer up in a few days? A. Yes, I did.

Q. Who was that? A. Ed Belden.

(Testimony of Clifford Damschen.)

Q. Did you attend that meeting at the Peterson Hotel on February 15? A. I did.

Q. Were there other employees of the respondent present? A. Yes, there were.

Q. Can you tell us approximately how many were present? A. Approximately 21.

Q. Do you know how many approximately were working at the yard at that time?

A. I would say approximately 26.

Q. Tell us what happened at that meeting, Mr. Damschen? What was said?

A. Well, while we were waiting for a majority of the crew to arrive it was more of a general visit, and then as I remember it Ed Gillespie said, "Well, let's get this thing over with and find out what we are going to do." As I remember then, I asked this Ed Gillespie who was going to do the talking, and Con Wear said, "Well, our foreman, Mr. Conlee, is here with us. He has had some good experience with unions back east, and I believe he can tell us a whole lot about them." [19]

Q. Let me interrupt a moment. Was this Con Wear that you have mentioned the same man that invited you and the man whom you identify as the straw boss? A. It was.

Q. And is Mr. Conlee, to whom Mr. Wear referred, the Pat Conlee who is the general foreman in charge of the pole yard? A. Yes.

Q. Can you tell us what was said after Mr. Wear made that statement about Mr. Conlee?

(Testimony of Clifford Damschen.)

A. Mr. Conlee started to speak. He said, "Boys, as far as I can see, everything has been going rosy in the yard. I thought we were getting along swell. And I believe if any of you fellows have any troubles to be settled you could come to me, and if I can't do anything for you, I will go higher." He said, "I have had experience with unions back east." He said, "They went out on strike and lost much more than they gained by their strike." He said, "They can call you out on strike any time they want to and tax you on your dues." And I interrupted him there and said I understood that men in the local had the right to vote as to whether they were taxed or went out on strike. And he said, "Yes, but they tell you how to vote." Then I suggested that there was several who did not understand what the union was and we should have an organizer or someone there to defend the union and [20] make it a two-sided discussion. Pat said, "That would not be a two-sided discussion. Them fellows have answers for every question you ask. They can paint some beautiful pictures, but I never seen one developed."

Q. Was that last statement that you made the statement that Mr. Pat Conlee made to you in reply to your statement to him? A. Pardon?

Mr. Brooks: Read my question.

(Question read).

A. (Witness pauses.)

Q. I will reframe my question. You apparently

(Testimony of Clifford Damschen.)

don't understand it. This conversation that you just related where you talked about organizers painting a picture and so forth was the conversation that occurred between you and Mr. Pat Conlee at that meeting? A. Yes.

Q. Go ahead and tell us what else happened after you had this exchange of remarks?

A. I went on to tell the fellows I thought there was several that really were not satisfied with wages and working conditions, and I informed them, —also mentioned my own wages. Pat Conlee asked me where they paid any more for my type of work, and I told him at the Newport yard or most any place that they used tractors. [21]

Q. Now, was anything said at that meeting with reference to the possibility or probability of a union organizer being in the town of Priest River sometime in the future?

A. Yes, I mentioned the fact that Ed Belden would be in the following Wednesday.

Q. Did you make any suggestion of any kind with reference to that?

A. I believe I related that he would be in and we could have a two-sided meeting.

Q. And that was the time you were for the two-sided meeting? A. Yes.

Q. Was there any vote taken at that meeting?

A. There was not.

Q. Was any vote suggested? A. Yes.

Q. What happened with respect to that suggestion?

(Testimony of Clifford Damschen.)

A. One of the workers suggested taking a vote and getting it over with, and I said we could not vote intelligently unless we heard both sides of the storey. So the meeting broke up without a vote.

Q. Do you recall anything else that was said after that meeting with reference to this union question?

A. George Cronkright gave a short talk.

Q. Let's identify him. Is that Cronkright C-r-o-n-k-r-i-g-h-t? [22]

A. I believe that is right.

Q. George Cronkright. Tell us who he was at that time?

A. As far as I know he was checker in the yard, pole checker.

Q. Go ahead and tell us what Mr. Cronkright said?

A. He told us about the recently purchased Bovill yard at Bovill, Idaho, that they had had a union there when the Schaefer-Hitchcock Company bought the place, and he expressed the opinion that they were very glad to go ahead with the new company without a union.

Q. Who? The employees?

A. The employees at the yard at Bovill.

Q. Did Cronkright state whether or not he had been to the Bovill yard?

A. I don't know as he did at this particular meeting.

Q. How do you spell Bovill? B-o-v-i-l-l (spell-

(Testimony of Clifford Damschen.)

ing)? I believe that is correct. That is a town in Idaho? A. Yes.

Q. After this meeting of February 15, 1941, about which you have been telling us, did you continue to talk to the employees of respondent at the pole yard—— A. I did.

Q. ——about unions? A. I did.

Q. Do you recall having a conversation with Con Wear some [23] few days after this February 15 meeting at which time unions were mentioned?

A. Yes.

Q. Where did that occur?

A. At the Peterson Beer Parlor.

Q. Who was present?

A. It was Con Wear, John Cronkright, Fay Dempsey and myself.

Q. Is this John Cronkright related to George Cronkright? A. He is George's son.

Q. First, can you tell me about how long after the February 15 meeting this occurred?

A. Approximately a week.

Q. Tell us what the conversation was at that time?

A. I don't remember just how it was brought up, but Con Wear brought up the union discussion, and he said we had been getting along pretty well and he hated to see a union come in and break us up. Then I told him I had not been satisfied with my wages for sometime, and he said, "Well, I believe we can straighten things out without a union."

(Testimony of Clifford Damschen.)

Q. Was that about all the conversation?

A. That is about all I remember.

Q. Directing your attention now to March 19, 1941, you have stated that that is the last day you worked there for the respondent. Will you tell us what happened on that date with reference to your employment with the company? [24]

A. Yes, it was payday at the yard, and I went in to get my check, and when I stepped in I was handed two checks, one paying me for two weeks or up until the 15th; and I was handed a second check paying me up until and including the 19th, up until 4 o'clock the 19th. It was handed to me by Pat Conlee. And he said, "That will be all for you, Clif." I stepped out the door. I did not know just what it was all about. But I turned around and walked back in and asked him, "Do you mean you don't want me to come back tomorrow?" He said, "That is right. We are cutting down the force. We won't be needing you any more."

Q. You have stated that you have been laid off on other occasions when the yard ceased operating for a while. On those occasions did you get paid right up to the minute that you were handed your check? A. No, I never did.

Q. Well, what happened with respect to the balance that was due you? How did you get your check?

A. It was either carried over until the regular

(Testimony of Clifford Damschen.)

payday, or we would get a time slip and go to Sandpoint to get our money.

Q. The offices of the company where Mr. Schaefer and Mr. Hitchcock are located are in the town of Sandpoint, Idaho, is that right?

A. Yes.

Q. And that is where you would go to get your checks? [25]

A. Yes.

Q. How far is Sandpoint from Priest River, approximately?

A. About thirty miles.

Q. Did Mr. Conlee give you any reason for telling you that you were through, except that they were cutting down on the force?

A. No.

Q. You were driving a tractor at that time?

A. Yes.

Q. How many tractors were operating at the pole yard?

A. Three.

Q. Who were the other employees operating these tractors besides yourself?

A. At that time it was Fay Dempsey and Clyde Wear.

Q. Were you operating a tractor for the company before Fay Dempsey?

A. Yes.

Q. I believe you stated you had been running a tractor about four years?

A. Yes.

Q. Do you know how long Fay Dempsey had been running a tractor there?

A. I would say two and a half years off and on.

Q. The other man was Clyde Wear?

A. Yes. [26]

(Testimony of Clifford Damschen.)

Q. Is Clyde Wear any relation to Con Wear?

A. Yes, he is a brother.

Q. How long had Con Wear,—I mean Clyde Wear been operating a tractor at that time, that is, March 19?

A. Approximately a week.

Q. Do you know whether or not either Fay Dempsey or Clyde Wear were laid off at that time or discharged?

A. They were not.

Q. Have you ever before during the four years you operated the tractor been taken off the tractor if even one tractor was running?

A. I recall once that I was taken off for a week.

Q. And were you laid off or put on another job?

A. I was put on another job.

Q. What was the other job?

A. Driving a team.

Q. And that continued for about a week?

A. Yes.

Q. And then did you go back on the tractor?

A. Yes.

Q. What type of jobs around the pole yard have you not done, Mr. Damschen, in your experience with this company?

A. I have not loaded poles or fired boiler.

Q. Have you done all the other jobs?

A. I have not run the loader or puncturing machine or [27] turning lathe.

Q. What are the different jobs that you have done besides driving a tractor and driving a team?

(Testimony of Clifford Damschen.)

A. I have tailed down.

Q. What is that?

A. That is roll poles off the track onto the skidways. I have sawed at the crosscut saw. I have worked on the vats. I have hooked chain. I have decked poles.

Q. What does decked poles mean?

A. That is piling poles up into piles. And I have worked with the decking crew when others were decking poles, and I have drove a tractor.

Q. And you have already told us you have driven team? A. Yes; that is about all.

Q. Do you know whether or not there were any employees continued in the employ of the company on March 19 that had been working for the company a shorter time than you? A. Yes.

Q. Can you name any of them?

A. Yes; in fact, the greatest majority of the crew, though there was a few hired just previous to my layoff.

Q. There were a few hired just prior to your layoff? A. Yes.

Q. Who were those persons? [28]

A. Joe Crane, Jack Guptil.

Q. G-u-p-t-i-l (spells it)? Is that the way to spell his name?

A. I think so. And Jens Knutson.

Q. That is Jens K-n-u-t-s-o-n (spells it)?

A. Yes. And John Ferguson.

Trial Examiner McNally: Ferguson?

(Testimony of Clifford Damschen.)

The Witness: Ferguson.

A. That is all I can recall from memory.

Q. Do you know whether or not Joe Crane continued to work after you were dismissed on the 19th?

A. He did.

Q. Do you know whether or not Jens Knutson continued to work after your dismissal on the 19th?

A. He did.

Q. Did, if you know, Guptil continue to work after your dismissal?

A. Yes, he did.

Q. And did Ferguson, if you know, continue to work after your dismissal?

A. Yes.

Q. What job was Joe Crane doing, if you know?

A. Driving team.

Q. What job was Knutson doing, if you know?

A. He was helping build a bridge. [29]

Q. What job was Guptil doing, if you know?

A. I don't know exactly. I believe he was working on the skidway.

Q. Have you done that kind of work previously?

A. Yes.

Q. What kind of a job was Ferguson doing?

A. He was building a bridge.

Q. After your dismissal on the 19th what, if anything, did you do with reference to that?

A. I went directly to Newport that evening and contacted the president of the union, Local 2614.

Q. And that man's name was what?

A. Clarence Butler.

(Testimony of Clifford Damschen.)

Q. Did anyone connected with the Brotherhood of Carpenters and Joiners or with the local or both get in touch with you shortly after your dismissal for the purpose of assisting you in getting reinstated? A. Yes.

Q. Who?

A. Clarence Butler and C. A. Paddock.

Q. Clarence Butler was president of the local and Mr. Paddock is the man at the table here (indicating Mr. Paddock)? A. Yes.

Q. When was that, if you remember?

A. March 22, 1941. [30]

Q. Did they come to Priest River?

A. Yes.

Q. What, if anything, did you and Mr. Butler and Mr. Paddock do?

A. First we went down to the pole yard to talk with Pat Conlee.

Q. Did you go into the yard?

A. I went into the yard but I did not go with them to talk with Mr. Conlee.

Q. But Mr. Butler and Mr. Paddock went over for the purpose of talking with Conlee?

A. Yes.

Q. But you were not present at any conversation they might have had?

A. No.

Q. After that what did you do?

A. From there we went to Sandpoint to talk

(Testimony of Clifford Damschen.)

with Mr. Schaefer and Mr. Hitchcock at their Sandpoint office.

Q. That was on the same day, March 22?

A. March 22, the same day.

Q. Did you have a conference with Mr. Schaefer and Mr. Hitchcock? A. Yes.

Q. Where did that occur?

A. In the Schaefer-Hitchcock office at Sandpoint. [31]

Q. Tell us who was present?

A. There was Mr. Hitchcock and Mr. Schaefer and Mr. Paddock and Mr. Butler and myself.

Q. Relate the conversations had at that time as far as you can, Mr. Damschen?

A. Mr. Paddock introduced himself and carried most of the conversation to start with, telling them why he was there, recalling this fact that I had been laid off and also reminded them of the meeting here on the 15th, and said he wanted to know why I was discharged. Mr. Schaefer said, "He was rough on the machinery. I caught him jerking the tractor, and I told Pat to can him." He said, "A few days ago I seen a man jerking a team, and I told Pat to can him." Then he asked me, "I understand you told someone you had not been satisfied with your wages for three years." I said, "That is right." He said, "By God, if a man ain't satisfied there, he can quit." I told Mr. Schaefer I thought there had been a mistake in my discharge and I would like to go back to work. And he told me,—he said, "I am

(Testimony of Clifford Damschen.)

not running that yard; Pat Conlee is. And if he wants to put you back to work, all right, and if he don't, all right." But he said, "I am not going to put you back on the tractor." So Mr. Paddock asked him if it would not be better if he would talk to Mr. Conlee, and I could talk to Mr. Schaefer that same evening and see what the results [32] were.

Q. Mr. Schaefer maintains his home in Priest River, does he not? A. Yes.

Q. Was anything said at that meeting about raising the wages?

A. Yes, Mr. Schaefer said something,—I don't remember just how he said it, but he told us they were raising the wages five cents at the yard.

Q. Was the Bovill yard of the respondent company mentioned?

A. Yes, Mr. Schaefer said something about purchasing the Bovill yard, and he said it appeared to him they were glad to go to work down there under the new setup without a union. Paddock told him that there was something wrong there somewhere, because he had received mail from the Bovill yard that there was something wrong and wanted someone to come up. Mr. Schaefer said, "That may be true. They may have changed their mind since I heard of it."

Q. You have told us that Mr. Schaefer said something about you jerking a tractor. Had you ever heard that accusation before? A. No.

(Testimony of Clifford Damschen.)

Q. Had Mr. Conlee ever told you your work was unsatisfactory? A. No.

Q. Had he ever criticized you for your work in any way? A. No. [33]

Q. Had Mr. Schaefer? A. No.

Q. Had Mr. Con Wear? A. No.

Q. Had anybody? A. No.

Q. After the conference with Mr. Schaefer at his office on the 22nd did you then go to his house that night as you had planned to do?

A. I did.

Q. That is at his house in Priest River?

A. Yes.

Q. Did you go into Mr. Schaefer's house?

A. No, I did not.

Q. What happened when you went to the door?

A. Mr. Schaefer met me at the door and before I said anything he said, "I talked with Pat, and I can't do a thing right now. Maybe a little later on we can get this thing straightened out, but right now, I can't do a thing."

Q. Did Mr. Schaefer invite you in?

A. No.

Q. Did you have any further conversation other than that? A. No.

Q. That is all that was said?

A. That is all. [34]

Q. Did you after that talk with Mr. Schaefer at his door get in touch with Mr. Paddock?

A. Yes, I went to the telephone office at Priest

(Testimony of Clifford Damschen.)

River and called for Paddock at the Desert Hotel in Coeur d'Alene. I told him what Schaefer told me, and Mr. Paddock said, "Well, I guess the best thing we can do is turn it over to the Board." I agreed with him, and so that was all that was said.

Q. Did you desire reinstatement?

A. Yes.

Mr. Brooks: You may have the witness.

Cross Examination

Q. (By Mr. Potts) During the years that you have worked at the Priest River plant of the Schaefer-Hitchcock Company have you ever seen a seniority list posted anywhere about the plant or office? A. No, I have not.

Q. Have you ever known of seniority being in effect in that plant?

A. Not officially, no.

Q. Or any other way?

A. Well, it always appeared that they favored their oldest and best hands.

Q. Usually they favored the older men, didn't they? A. Yes. [35]

Q. There were other reasons why they favor some particular individual, were there not, besides their age or capability? A. I think so.

Q. For instance, take this man Fay Dempsey who was driving a tractor on March 19, of this year at the time you were laid off. Do you know anything about his physical condition at that time?

(Testimony of Clifford Damschen.)

A. I think so.

Q. How long had he been driving a tractor on that date?

A. Two and a half years or so off and on.

Q. And how long had he been driving a tractor continuously prior to that date?

A. I would say approximately a year.

Q. And at that time and for some time prior to March 19, 1941, he was in a physical condition so that he could not do heavy work, wasn't he?

A. That is right.

Q. And as far as work available in this plant is concerned, about all he could do was drive a tractor, wasn't it? A. That is right.

Q. So you would say he was retained to drive a tractor for that reason, wouldn't you?

Mr. Brooks: I object to that as calling for a conclusion of the witness and something that can't possibly be within the knowledge of this witness.

[36]

Mr. Potts: I don't think——

Trial Examiner McNally: Objection sustained.

Q. (By Mr. Potts) Now, you first commenced to work for the Schaefer-Hitchcock Company at what time? A. In the spring of 1934.

Q. And at that time you worked there only a short period? A. Yes.

Q. How long did you work altogether during the year 1934 after that?

(Testimony of Clifford Damschen.)

A. I could not be very accurate about that period. I would say approximately a month.

Q. What were you doing during that year?

A. Well, I was common laborer more or less; hook chain, if I remember right.

Q. So that the greater part of the year you were doing something else, other than working for them? A. Yes.

Q. Now, going to 1935, did you work any during that year at this plant? A. Yes.

Q. When did you start to work?

A. I believe it was the last day of April, 1935.

Q. How long did you work during that year?

A. Well, I worked four or five months at least, during the summer. And that winter the majority of the crew was [37] off more or less of the time.

Q. Anyhow, you were off, weren't you?

A. Yes.

Q. But there was always some members of the crew retained during the winter, wasn't there, while you were working there from the time you first started?

A. Yes, a few of the very oldest heads.

Q. The plant never closed down entirely?

A. Yes, it did.

Q. At what time? At any certain period?

A. No, no, sir. It may be today, and in a week it may run, and then it may be down a month.

Q. But when it is down are all the crew laid off?

(Testimony of Clifford Damschen.)

A. According to my knowledge perhaps a foreman is kept on the payroll. I don't know.

Q. If there is any shipping of poles a portion of the crew is required, isn't it? A. Yes.

Q. Even though no poles are being brought in from the woods? A. That is right.

Q. During the year 1935 you also worked as common laborer, didn't you? A. Yes.

Q. And what about 1936? [38]

A. More or less the same thing.

Q. What portion of that year did you work at the plant?

A. I cannot tell you very accurately. I would say about the same as 1935.

Q. Then in 1937 is that when you started driving a truck?

A. Driving a tractor, as near as I can remember.

Q. A tractor. Was that when the tractors were first installed or placed in operation in the yard?

A. There was one installed, but I did not go to work on it when it was first installed.

Q. How many tractors were operating at the time you first commenced driving a tractor?

A. One.

Q. And when did you start your tractor driving at the date you mentioned?

A. I went to work the last of April, 1935, but as to the actual date I started driving a tractor, I don't know.

Q. What year did you start?

(Testimony of Clifford Damschen.)

A. 1937 is as near as I can tell. I would say early spring before the snow went off.

Q. Did you drive a tractor all during the year 1937? A. I did.

Q. Weren't you laid off from time to time?

A. I think so, yes.

Q. Do you know how many days you were laid off? [39] A. No, I don't.

Q. Several, at least?

A. Several short periods.

Q. And for periods of weeks at a time?

A. I would not say weeks, I would say a week.

Q. You would say at no period were you laid off several weeks during that year?

A. It could be possible. I would not say.

Q. Did you continue driving a tractor in 1938 when you worked? A. I did.

Q. How much of the year did you work?

A. The majority of the year. I would not be too accurate on that.

Q. Again you were laid off from time to time?

A. Yes.

Q. And were you transferred to other work during that year at any time?

A. If the tractor did not run and there was other work to be done, yes.

Q. That is, if both conditions existed, if the tractor did not run and if there was other work available, you say? A. Yes.

(Testimony of Clifford Damschen.)

Q. But there were times when neither condition existed, weren't there? [40] A. Yes.

Q. And then you were laid off entirely?

A. Yes, along with a majority of the rest of the crew.

Q. And did you have that general setup during 1939 and 1940? Was there any change in the situation?

A. Yes, there was some change. I worked much steadier in 1939 and 1940.

Q. Driving a tractor or otherwise?

A. Mostly driving a tractor.

Q. But you were laid off for periods in each year, weren't you?

A. The last two years very little, and when that happened, they took in practically the entire crew.

Q. Were you driving tractor throughout the winter of 1940-41, that is, going back to the late fall of 1940 and extending through the winter of 1941?

A. I think so, yes.

Q. And three tractors were operating at that time, were they not? A. Not in 1940.

Q. The last part of 1940 and early part of 1941, prior to March 19th?

A. Two tractors more or less at that time.

Q. Did you not say there were three tractors operating?

A. At the time I left the yard. [41]

Q. How long had the three tractors been operating?

(Testimony of Clifford Damschen.)

A. I would say,—I really don't know what to say as to that,—I don't know.

Q. For some time, hadn't there,—more than a few days?

A. It was off and on. Do you remember I told Mr. Brooks Clyde had only been driving a week. His tractor was in the shed while the other two were driven. So this one, the light Fordson, was used very seldom in the yard. The majority of the time it was just the two tractors in the yard at the time I left there.

Q. Which tractor did you drive? Any special one?

A. Well, as an average rule, a special one, yes. I was driving an Allis Chalmers tractor, but there was times when Mr. Schaefer bought the Fordson with a set of plows that he sent me out to do some plowing, and when that tractor returned I skidded poles a while with it.

Q. Had there been any union activity or talk about a union coming into that plant prior to the first day of January, 1941, as far as you know?

A. Not that I know of; not that I know anything about.

Q. When did it first start?

A. Approximately the first of February, 1941.

Q. And did you start it? A. I did.

Q. Did you first take it up with some of the employees there? [42] A. I did.

(Testimony of Clifford Damschen.)

Q. Or did you first take it up with a union representative?

A. Well, I first mentioned it to a friend of mine that was working in the Newport yard, to send someone up here, but then I started talking to the fellows in the yard before I talked to an organizer.

Q. How many fellows in the yard did you talk to?

A. Up until the time I got signed up only about half a dozen.

Q. And who were they?

A. There was Fay Dempsey, Orville Gillespie, Claude and Harry Hustead.

Mr. Schaefer: H-u-s-t-e-d.

Q. (By Mr. Potts) Was that all?

A. That was all I can think of right now.

Q. Where did you talk to them? There in the yard?

A. Yes.

Q. Then was any arrangement made about getting in touch with the union representative by you and those men that you talked to?

A. Not by the men I talked to; by myself.

Q. They had no part in the activity of getting in touch with the union representative?

A. No, they did not.

Trial Examiner McNally: Is this a convenient time to recess? [43]

Mr. Potts: Yes.

Trial Examiner McNally: We will recess for ten minutes.

(Testimony of Clifford Damschen.)

(Whereupon a short recess was taken, after which proceedings were resumed as follows:)

Trial Examiner McNally: The hearing will come to order.

Q. (By Mr. Potts) Mr. Damschen, we were just talking about the other employees to whom you had mentioned or continued to discuss the matter of the union prior to the February 15 meeting, and my recollection is that you named four. I wish to ask you if those are all that you talked to prior to this meeting.

Mr. Brooks: May I inquire if that is prior to February 10?

Mr. Potts: February 15.

Mr. Brooks: Oh, February 15.

Mr. Potts: Yes, prior to February 15.

A. I talked to Jack Webb prior to February 15.

Q. (By Mr. Potts) You did mention an attempted meeting February 11, I believe?

A. Yes.

Q. Was that meeting held? A. Yes.

Q. But there were not many present?

A. There were not many present.

Trial Examiner McNally: I am not sure that the record [44] is clear on the period during which the witness testified that he talked to other employees. Counsel mentioned February 15. I understood the witness' testimony to be that he talked to about six men prior to the time that he himself signed up with the union.

(Testimony of Clifford Damschen.)

The Witness: Yes, that is right.

Mr. McNally: I don't know whether that is before February 15 or not.

The Witness: Up until the 15th there was very few that I had not talked to.

Q. (By Mr. Potts) Up to February 15?

A. Yes.

Q. When was it that you signed your application for membership in the union?

A. The 10th of February.

Q. 10th of February? A. Yes.

Q. And then you had invited several employees to attend this meeting on February 11, had you not?

A. Yes.

Q. How many did attend it?

A. Two besides myself.

Q. Two besides yourself. How many did you ask to be present?

A. Oh, the majority of the crew. [45]

Q. And the crew at that time had between 30 and 40 members, did it not?

A. A while ago I stated about 26.

Q. Was there any change in the number of the employees in the plant during February and March prior to the time you left? A. Yes.

Q. Had they increased or decreased?

A. Increased.

Q. Was that increase during the month of March? A. A great part of it, yes.

Q. Well, on March 19, without being absolutely

(Testimony of Clifford Damschen.)

accurate, do you think the employees then numbered about 37?

A. I don't think they numbered that many. It could be true.

Trial Examiner McNally: What was the number, please?

Mr. Potts: 37.

Q. (By Mr. Potts) When you attempted to hold this meeting on February 11 and two besides yourself attended, did you then take any further steps toward holding a meeting yourself? A. Yes.

Q. Did you arrange to have a meeting held?

A. Yes.

Q. When was it to have been held?

A. It was the Wednesday following the 15th. I am not sure of the date.

Q. Well, the 15th was Wednesday, was it not? [46]

A. It was on Saturday.

Q. Oh, that was Saturday. That is right. When did you make the arrangements to attempt to hold another meeting? Before or after the 15th?

A. Before. I made it at the meeting of the 11th.

Q. With these two others who were there?

A. Yes.

Q. But you had not done anything about it before you had your conversation with Mr. Wear about the meeting to be held on the 15th?

A. I don't quite understand the question.

Q. You had a conversation with Con Wear prior

(Testimony of Clifford Damschen.)

to February 15, the date on which you had a meeting. Had you talked to anybody about holding this other meeting later on prior to the conversation you had with Mr. Con Wear when he invited you to the meeting of the 15th?

A. I was invited to that meeting on the 15th.

Q. Well, had you talked to any of the men before you got that invitation about holding a meeting later than the 15th? A. I think so, yes.

Q. To whom had you talked besides the two men who met with you on the 11th?

A. That is pretty hard to recall. I know Fay Dempsey was one and Pete Morrow was one and Orville Gillespie was one [47] and the two Husted brothers. That is all I will say accurately.

Q. The same men that you talked to before about the meeting that you attempted to hold?

A. More or less, yes.

Q. Where did you meet Con Wear or where did he meet you when you had the conversation at which he invited you to attend this meeting on the 15th? A. Where did we what?

Q. Where did you meet?

A. When he invited me?

Q. Yes.

A. On the street in Priest River.

Q. On the street here? A. Yes.

Q. That was on Saturday morning, was it?

A. No, after work, just prior to the meeting.

Q. And he came to see you, did he?

(Testimony of Clifford Damschen.)

A. We just happened to meet on the street.

Q. What did he say to you?

A. He said, "Cliff, we are going to hold a meeting in the Peterson Hotel at 4 o'clock to discuss this union thing." He said, "We would like to have you attend." I asked him who was going to be there to defend the union, and he said no one, that it was just going to be a friendly chat among the workers as to whether they would join a union or not. [48] I told him I did not think it was a proper kind of a meeting to hold, that we should have somebody to discuss the inside of the story, and that we were to have an organizer come up in a few days; and we would have a two-sided meeting. He said, "That is all right. You have your two-sided meeting if you want to, but this is just going to be a friendly chat among the workers, and we would like to have you come."

Q. And you attended the meeting in response to the invitation? A. I did.

Q. Did you attempt to get an organizer or any union representative to attend the meeting with you?

A. Not at that time. There wasn't time.

Q. Now, when you arrived,—you say the meeting was held at the Peterson Hotel?

A. That is right.

Q. In what place in the hotel?

A. They have a large room in the back end.

(Testimony of Clifford Damschen.)

Q. At what time of day did the meeting convene?
When did you get there?

A. As near as I can remember, it was 4 o'clock,
4 or 4:30.

Q. Did you go alone or with someone?

A. There was a group of us who went more or
less together.

Q. A group. [49]

A. We sort of congregated on the street and got
together and went in in a group.

Q. When you arrived had others already gathered?
Were there others already present?

A. I believe we all went in more or less together.
We congregated on the street.

Q. And when you got into this room you think
there were about 21 of you altogether?

A. I think so.

Q. Now, what was the arrangement there? Were
there chairs in which you sat?

A. Yes, there were chairs and a davenport and
there were too many,—there weren't chairs enough
to accommodate the men, and there were several
who sat on the floor.

Q. And you just held an informal talk, did you
not, among yourselves?

A. To start with, yes.

Q. You had no chairman, did you?

A. No.

Q. There was no chairman of the meeting or

(Testimony of Clifford Damschen.)

anybody who presided or acted as a presiding officer? A. Not that I know of.

Q. No secretary? A. No.

Q. How long did that meeting last?

A. I think three quarters of an hour. [50]

Q. After you had settled down and commenced to talk several employees expressed themselves, didn't they? A. Yes.

Q. And isn't it a fact that before Mr. Conlee, the foreman, said anything that a number of the employees had already talked?

A. That is not true.

Q. Do you mean to say that he spoke first?

A. He did not speak first, but not a number of them spoke.

Q. How many had spoken before he did?

A. There was nobody spoke on the union as I remember. The first one to speak was Con Wear introducing Mr. Con Wear.

Q. Didn't Ed Gillespie say something about asking Mr. Conlee to speak?

A. As I remember, Ed Gillespie only said, "Let's get this thing started. Who is going to do the talking?"

Q. And didn't he say, "We have Mr. Conlee here, and he has had experience with the unions."

A. No, he did not say it.

Q. Did anybody say it?

A. Con Wear said, "We have Pat Conlee, the foreman, and he has had experience with the unions

(Testimony of Clifford Damschen.)

back east, and I believe he can give us some pretty good information.

Q. Did Mr. Conlee arise then and start to talk?

[51]

A. No, he did not. He remained seated.

Q. And he just spoke in a conversational way?

A. Yes.

Q. Now, did he not first say at the very outset that as far as the company was concerned, they did not care whether the men joined the union or not?

A. I don't remember him saying it in that way.

Q. Didn't he make a statement to that effect?

A. He made a statement that he was not there representing the company.

Q. What else did he say in that connection?

A. Then he went on to say everything had been, as far as he knew, everything had been rosy in the pole yard with everybody getting along well.

Q. Prior to that, in connection with this other observation when he said he was not there representing the company, didn't he say that the company did not care whether the men joined the union or not, they were perfectly free to join a union if they saw fit, or words to that effect?

A. I don't remember him saying that.

Q. Well, he mentioned that things had been going along well, or words to that effect, and then what did he say?

A. He said he believed if the men had any griev-

(Testimony of Clifford Damschen.)

ances to settle, they could come to him, and if he could not help them, he would go higher to do so.

[52]

Q. He did not say any man would lose his job if he joined the union, did he? A. He did not.

Q. He did not say that the employees ought not to join the union, did he?

A. Not in them words, no.

Q. Did he say that the Schaefer-Hitchcock Company would close its plant if the employees joined the union? A. No.

Q. Did he say that the company would curtail operations if the employees joined the union?

A. No.

Q. Did he say that the company would take any action in any way if the employees either joined or were active in the union? A. He did not.

Q. He did not make any threats at all, did he?

A. No.

Q. After he spoke did others speak or talk?

A. Yes.

Q. You would not call anything that anybody said there a speech, would you?

A. I don't think so.

Q. It was just an ordinary informal conversation, speaking from where they sat? [53]

A. Yes.

Q. Now, after you had discussed the matter of having a union representative there, there was no argument about it, was there?

(Testimony of Clifford Damschen.)

A. No, I believe not.

Q. And there was no ill feeling on the part of anyone expressed, was there?

A. Except what Pat Conlee said, that that would not be a two-sided meeting, that they had answers for each question you can ask them, and that they can paint a beautiful picture, but he had never seen one developed.

Q. Well, he was not mad when he said that, was he? A. I don't think so.

Q. Well, did anyone else talk after he had finished?

A. Several gave short sketches of their opinion of unions, all not in favor of the union.

Q. Everything that was said was not in favor of the union, was it? A. That is right.

Q. Well, after they had finished expressing their opinions did the meeting break up or turn into a social gathering?

A. Turned into more or less of a social gathering.

Q. And it lasted for sometime afterward as a sort of a social gathering, after which refreshments were served? A. That is right. [54]

Q. By the way, Mr. Damschen, Mr. Pat Conlee left the meeting shortly after?

A. As soon as it broke up, he left.

Q. That is as soon as the conversation about the union broke up? A. Yes.

Q. But the meeting itself had not broken up?

(Testimony of Clifford Damschen.)

A. The meeting had broken up, yes. The meeting had come to a close, as I remember.

Q. But the boys stayed there for sometime?

A. Yes, and Pat Conlee left.

Q. Now, Mr. Damschen, after that meeting on February 15 did you take any action or do anything in February or March in the way of trying to organize a union at the plant?

A. Only to talk to the fellows.

Q. When did you talk to them?

A. Practically every day, whenever time permitted.

Q. You mean while you were working?

A. No, not while I was working.

Q. While you were in the plant? A. Yes.

Q. That is, you would talk to different ones?

A. Yes.

Q. How many different ones did you talk to?

A. It would be hard to say. I sort of had my men picked [55] out as to who would be interested, and I tried to encourage those.

Q. About how many of them were there who showed some interest? A. Ten or fifteen.

Q. Including those that you named before that you talked to and tried to get to attend meetings?

A. Yes.

Q. Did you go ahead with your proposed meeting on the Wednesday following the 15th?

A. We did.

Q. Did you hold a meeting? A. No.

(Testimony of Clifford Damschen.)

Q. How did you go ahead with the meeting then?

A. They appeared, but there was no one showed up for the meeting. The hall was rented, and the organizer and a couple of fellows from the Newport local came over, but no one from the yard except myself showed up.

Q. Not a single employee showed up?

A. No.

Q. Had they all been invited?

A. I think so.

Q. Then there was not any other attempt to hold a meeting, was there? A. No. [56]

Q. And from that time on until you were laid off you did not take any further action, did you?

A. Not towards holding meetings. I went on talking union.

Q. But you could not interest any of the men, could you?

A. Yes, they were more or less interested. We did not have any date set for the organizer to return.

Q. On March 19,—you say that was the regular payday for the preceding month or half month. Which was it?

A. Half month. I don't know whether you would call it the regular payday. The payday is the 15th, but the time has to go to Sandpoint and back. It is not always the 19th, but it happened to be in this case.

(Testimony of Clifford Damschen.)

Q. Anyhow, the pay period was the first half of the month? A. Yes.

Q. And you received your check for the first half of March and then another check for the four days of the second half? A. Three days.

Q. Three days. And at that time Mr. Conlee told you that,—just exactly what did he tell you?

A. He handed me two checks and he said, "That will be all for you, Clif." And I walked out and turned around and thought it over and walked back in and I asked him, I said, "Do you mean that you don't want me to come back tomorrow?" And he said, "That is right. We are cutting [57] the forces and won't be needing you any more."

Q. Is that all? A. That is all.

Q. And you left? A. Yes.

Q. Now, you did not go back to see Mr. Conlee prior to the time you saw Mr. Schaefer in Sandpoint? A. No.

Q. In fact, you never went back to see Mr. Conlee? A. I never did.

Q. Now, in connection with this conversation with Mr. Schaefer and Mr. Hitchcock at the office of the company at Sandpoint, I understand from your testimony that besides them and yourself, Mr. Paddock and Mr. Butler were present?

A. Yes.

Q. Mr. Butler was president of the local union?

A. That is right.

(Testimony of Clifford Damschen.)

Q. Mr. Paddock did most of the talking at that conference, did he not? A. Yes.

Q. And I will ask you if it is not a fact that the remark made by Mr. Schaefer concerning you being rough with the tractor was to this effect, that he knew you were rough with the tractor and that might have been the reason you were laid off?

A. No. [58]

Q. Was it that in substance?

A. No, it was exactly the way I stated it before.

Q. Now, I will ask you to state it again.

A. Mr. Paddock asked him why they let me go, and Mr. Schaefer said, "He was rough with the machinery. I caught him jerking the tractor, and I told Pat to can him." He said, "A few days ago I seen a man jerking a team, and I told Pat to can him."

Q. You are positive those are the exact words, are you? A. I am quite satisfied of that.

Q. And that evening when you went to his home in Priest River, when he came to the door you simply asked him how about it, didn't you?

A. I think so.

Q. And he told you he could not do anything about it?

A. Well, that is true. There was more said than that.

Q. Well, he said that anyhow? A. Yes.

Q. He did mention that he had seen Mr. Conlee and discussed the matter with him?

(Testimony of Clifford Damschen.)

A. Yes.

Mr. Potts: That is all.

Redirect Examination

Q. (By Mr. Brooks) Mr. Damschen, Mr. Potts asked you about seniority at the pole yard here and whether or not there was [59] any seniority list and so on. I will ask you if sometime last year the employees at the pole yard were granted a vacation with pay? A. That is right.

Q. Was every employee working there given a vacation with pay? A. No.

Q. Was some system followed, if you know?

A. I don't know, but I understood that those who received vacations with pay were men who had been there two years or more.

Q. You do know some persons who had been there a shorter time than two years who did not get a vacation, do you not? A. Yes.

Q. Incidentally, do you know whether or not this Clyde Wear who was one of the tractor drivers at the time of your dismissal was given a vacation?

A. I think not.

Trial Examiner McNally: Am I correct in the understanding that the vacation was granted prior to January 1, 1941?

Mr. Brooks: I think that is right.

Q. (By Mr. Brooks) Is that true?

A. Yes, that was in 1940.

Q. In 1940? A. Yes.

(Testimony of Clifford Damschen.)

Mr. Brooks: That was my understanding.

Q. (By Mr. Brooks) Mr. Potts also asked you about this [60] gentleman Fay Dempsey who was driving a tractor and about his being favored because of his physical condition. Were there occasions prior to March 19, 1941 that Mr. Dempsey was taken off the tractor and you were kept on?

A. Yes.

Q. Do you know whether or not a second shift was added at the pole yard after you were dismissed on the 19th of March?

A. Yes, I understand there was.

Q. Do you know whether there were additional men hired for the tractor job?

A. Yes, there were.

Q. Can you name any of them?

A. Yes, there was Cleo Thomas, and Ed Delavout.

Mr. Conlee: D-e-l-a-v-o-u-t (spells it).

A. (Resuming) There were different ones off and on, I believe. I would not be sure just in what order they worked.

Q. Was there a man named Roy Dempsey hired on the tractor job after your dismissal?

A. Yes, and also I believe Sam Delavout, and also Orville Gillespie drove tractor a while but in the order they worked, I don't know.

Q. In the past when you were laid off because operations were curtailed were you called back to work when the work [61] was available?

(Testimony of Clifford Damschen.)

A. Yes.

Q. Is that true on every occasion when you were laid off, that you were notified when to come back?

A. If you didn't appear. There was times that some of us would appear if we thought there might be something doing.

Q. Were you ever called back to work after the 19th when this second shift was added?

A. No.

Q. Or at any other time since the 19th?

A. No.

Q. With reference to your layoffs in 1939 and 1940, is it true that on those occasions when you were laid off from work entirely that there was nothing remaining except a skeleton force, clean up men and work like that? A. That is right.

Q. On those occasions when there were layoffs, what occasioned them? A lack of poles coming in from the woods or matters of that kind?

A. That or lack of orders.

Q. You have told us that at this February 15 meeting several others expressed themselves against the union. Did any person present at the meeting on February 15, 1941 express himself in favor of the union besides you? A. No. [62]

Mr. Brooks: I think that is all.

Recross Examination

Q. (By Mr. Potts) When was this second shift put on after March 19, 1941?

(Testimony of Clifford Damschen.)

A. I believe it was the first of May.

Q. Where were you at that time?

A. I was at home.

Q. Hadn't you at that time got another job?

A. No, sir.

Q. How is that? A. I had not.

Q. Were you down here when the shift was put on? A. I was in Priest River.

Q. Where did you learn of it?

A. All my friends work there. I see them every day.

Q. Now, you know how that plant has been running during the last several years during your employment there, don't you?

A. I think so, more or less.

Q. You know the customs that were followed in the employment of men from time to time, what they actually did? A. Yes.

Q. Isn't it a fact that frequently or at least many times during your years of employment men who were waiting down there in the morning for work would be hired because they were there ready to go to work, seeking work, without [63] notifying any former employees that jobs were open?

A. Oh, we were always notified. Many new heads that had been very recently hired,—they hired men that were there without notifying them if they were really new heads; but the old heads were always notified.

Q. Whom do you mean by "old heads"?

(Testimony of Clifford Damschen.)

A. I mean men who had been there four or five years or more.

Q. Don't you know that upon more than one occasion the plant has closed in the evening because of lack of poles or the pole situation, and they would not know whether they were going to require a certain sized crew the following morning?

A. Yes.

Q. And then the poles would come in and the situation changed and men would be hired to work and they would be put on right then, men who were seeking jobs who had not formerly worked there?

A. Not ahead of men that were as old as I was.

Q. Aside from men that were as old as you were, don't you know of such occurrences happening often?

A. With men that were fairly new hands, yes.

Q. That is, you mean they would put these new employees on without waiting to notify the men who were fairly new hands?

A. Yes. [64]

Mr. Potts: That is all.

Mr. Brooks: I have one other question.

Redirect Examination

Q. (By Mr. Brooks) Do you know whether or not, Mr. Damschen, any other employee was dismissed from the pole yard at Priest River or laid off on March 19, 1941, besides yourself?

A. As far as I know, there was none.

Mr. Brooks: That is all.

(Testimony of Clifford Damschen.)

Mr. Potts: That is all.

Examination

Q. (By Trial Examiner McNally) Mr. Damschen, with reference to these layoffs that affected you from time to time, say in 1939 and 1940, can you give us an idea how many times you were notified to come back to work?

A. It would be pretty hard to do. Many times we were laid off of an evening and notified again that same evening or the following morning or the following day. However, it didn't happen so often in the last two years because the work has been fairly steady.

Q. Well, during the last two years were you ever at the plant after being laid off and then hired? A. Yes.

Q. What I mean is that you went to the plant looking for work? [65] A. Yes.

Q. After you had been laid off? A. Yes.

Q. Now, about how many times did that occur in 1939 and 1940?

A. Very seldom. I really could not give you an estimate.

Q. Well, can you approximate for us the total number of times you were laid off in 1939 and 1940?

A. Well, that would be very hard to answer.

Q. You would not care to estimate it?

A. I would say,—I would estimate it at half a dozen times a year.

(Testimony of Clifford Damschen.)

Q. Can you estimate the number of times in each year that you were notified to come back to work after being laid off some six times?

A. Well, they had a system of blowing the whistle when they wanted men to come back to work, and we were notified that way as a rule, but there was a few times when I was notified personally.

Q. About how many times would you estimate that you were notified personally?

A. More often than I was not notified; about twice as much, I would say.

Q. The blowing of the whistle that you speak of,—just for the record, would you tell us what the population of [66] Priest River is?

A. Well, I don't really know.

Trial Examiner McNally: What is the fact?

Mr. Schaefer: About fourteen or fifteen hundred.

Q. (By Trial Examiner McNally) How would the whistle work? Was it blown at a certain time? How long was it blown or how was the notification given to the employees to come back to work by blowing the whistle?

A. It is really the only whistle of its kind in the vicinity, and any time we heard the pole yard whistle we recognized it; and whatever time of day it was, it meant to come to work.

Q. How long would you have to get down there to work after the whistle blew?

(Testimony of Clifford Damschen.)

A. No specified time; whenever you got there you went to work.

Q. From your actual observation can you tell us anything about men waiting at the gate there or at the pole yard who were hired? A. No.

Q. Did you ever see that done?

A. Well, yes, I have; not ahead of the old ones, though. Where they had laid off someone a few days previous who perhaps lived out of town and there were new men waiting to go to work and there wasn't much difference in their [67] seniority, the new men would be put back to work.

Q. On what do you base that statement?

A. I don't understand the question.

Q. Are you well acquainted enough with all the men who work there to have a pretty good idea of their seniority or how long they worked there?

A. Yes.

Q. And you could tell which of the men were new men or about how long they worked there and which were the old men? A. Yes.

Q. Can you tell us of your own knowledge of any instance where a man had worked off and on for the company for four or five years and then lost out after a layoff insofar as he was not recalled to work and a new man hired at the gate or the pole yard in preference to him? Do you understand the question?

A. Yes, I think I do. I recall one instance to that effect.

(Testimony of Clifford Damschen.)

Q. Was that temporary employment or permanent employment?

A. For the new man, you mean?

Q. Yes, did he permanently take the place of the old man or temporarily?

A. In this one instance he permanently took it.

Q. Now, can you give us for the record some idea of how steadily the employees work at the pole yard? [68]

A. It varies a great deal. At different times in the past two years it has been quite steady.

Q. Well, there are hourly paid employees, I take it? A. Yes.

Q. They might be laid off without getting in a full day? A. That is right.

Q. In other words, they are laid off as soon as there is no work to be done? A. Yes.

Q. Irrespective of how long the employees had worked on a certain day or during a certain week?

A. Yes.

Q. The layoff comes swiftly, does it?

A. Yes.

Q. And the recall to work is just about as swift?

A. Yes.

Trial Examiner McNally: Is there anything further?

Mr. Brooks: I have some further questions, Mr. Examiner.

Trial Examiner McNally: Very well.

(Testimony of Clifford Damschen.)

Redirect Examination

Q. (By Mr. Brooks) You stated in answer to questions by the Examiner that about six layoffs probably occurred during 1939 and 1940. Were those of varying duration? That is, it might be for a few days or a week? [69] A. Yes.

Q. You include in that every time you were laid off for any period of time, is that right?

A. Yes.

Q. With reference to blowing the whistle by the pole yard to notify the men to come back, is it not true that such policy was followed where the yard was down completely, and this was to notify the employees they were starting up operations again? A. Yes, that is right.

Q. The whistle, of course, would not be used if one or two or five employees had been laid off?

A. No.

Q. Do you live in Priest River? A. Yes.

Q. How far from the center of town?

A. A mile and a half.

Q. How long have you lived in Priest River and vicinity? A. About eight years.

Q. How long have you lived at the place you are now living? A. A year and a half.

Q. Are you buying or renting your place?

A. Buying.

Q. You mentioned that to your knowledge there was one [70] instance of a man who had worked

(Testimony of Clifford Damschen.)

for the company here for sometime being replaced by a new man. When did that occur?

A. I can't be very accurate on that. It happened about two years ago.

Q. Do you know whether or not he was replaced because he did not show up at the time that work was available?

A. In my opinion he was.

Mr. Potts: Oh, I object, unless he knows.

Mr. Brooks: I am just asking if he does know.

Trial Examiner McNally: Just tell us what you know.

Q. (By Mr. Brooks) Just tell us what you know about it. You said there was an instance.

A. The question again, please?

Q. Tell us what you know about this instance as to why it happened. If you don't know, just tell us so.

A. He was an old man. I figured he was just simply put out because of his age and the younger man took his place.

Q. You mean he was an old man in age?

A. Yes.

Q. About how old? A. Sixty-five.

Q. How old are you? A. Twenty-nine.

Mr. Brooks: That is all. [71]

Trial Examiner McNally: Anything further?

Mr. Potts: No.

Trial Examiner McNally: You may step down, Mr. Damschen.

(Witness excused.)

Trial Examiner McNally: Off the record.

(There was some discussion off the record.)

Trial Examiner McNally: We will adjourn until two o'clock.

(Whereupon at 12:00 Noon, hearing recessed until two o'clock p. m.) [72]

Afternoon Session—2:00 P. M.

(Pursuant to the taking of noon recess, the following proceedings were had:)

Trial Examiner McNally: Are you ready, gentlemen?

Mr. Brooks: Yes. Call Mr. Paddock.

CHARLES A. PADDOCK,

a witness called by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brooks) State your name, please.

A. Charles A. Paddock.

Q. That is P-a-d-d-o-c-k? (Spelling)

A. That is right.

Q. What is your mailing address?

A. At the present time it is 737 East 34 Street, Spokane, Washington.

Q. And what is your occupation?

A. I am an International representative of the

(Testimony of Charles A. Paddock.)

United Brotherhood of Carpenters and Joiners of America.

Trial Examiner McNally: May I interrupt at this point?

Mr. Brooks: Yes.

Trial Examiner McNally: I notice in the charge that the name Schaefer is spelled with two f's.

Mr. Brooks: Is that an incorrect spelling of it?

Trial Examiner McNally: In the other pleadings that we [73] have it is spelled with one f.

Mr. Brooks: Which is the correct spelling?

Mr. Schaefer: S-c-h-a-e-f-e-r (spells it).

Mr. Brooks: One f?

Mr. Schaefer: One f.

Mr. Brooks: I move to amend the caption of the charge further to conform to the spelling given by Mr. Schaefer.

Trial Examiner McNally: Any objection?

Mr. Potts: No objection, of course, only I suggest that there should be included in that motion the correction of the spelling of the name Damschen, as it is misspelled in the charge.

Mr. Brooks: That is correct. I agree with counsel that that should be included in the motion. In the charge the name is spelled "er". The "r" should be "n".

Trial Examiner McNally: Any objection?

Mr. Potts: No.

Trial Examiner McNally: Both motions to

(Testimony of Charles A. Paddock.)

amend the charge are granted. Excuse me for interrupting.

Mr. Brooks: Certainly. I want to thank you for calling that to my attention.

Q. (By Mr. Brooks) Mr. Paddock, as representative of the Brotherhood of Carpenters and Joiners, what territory do you cover?

A. I have been covering the territory from the Canadian [74] line south down into Central Oregon in the States of Montana, Idaho, Eastern Washington and Eastern Oregon.

Q. This charge in this matter was filed, I notice, by you on behalf of Local 2614. Was that at the request of the officers of that local? A. Yes.

Q. Are you acquainted with Local 2614, called the union in the pleadings in this case?

A. I am.

Q. By what organization is that local chartered?

A. By the United Brotherhood of Carpenters and Joiners of America.

Q. And the Lumber and Sawmill Workers is a branch or division of the Brotherhood?

A. That is right.

Q. And the Brotherhood, I believe you stated when you stated your appearance, is affiliated with the American Federation of Labor? A. Yes.

Does Local 2614 have any defined jurisdiction as far as geography is concerned?

A. Not at the present, no. They have not had as yet.

(Testimony of Charles A. Paddock.)

Q. Directing your attention to the month of February, 1941, did it come to your attention in your official capacity that an organizer for the Brotherhood of Carpenters [75] had come into Priest River? A. Yes.

Q. Do you know whether or not prior to that time there had been any kind of an organizational campaign conducted by your organization among the employees of this respondent at Priest River?

A. I don't know. I don't think there had, though.

Q. There was none that you know of prior to that time? A. None that I know of.

Q. Directing your attention to the month of March and more particularly to a day or so after the 19th of March, did you receive any request from Local 2614 with reference to rendering them some kind of assistance? A. Yes, I did.

Q. What was that request?

A. I got a request for me to come up here to assist the organization in the matter of Damschen being discharged.

Q. Did you come to the vicinity of Newport and Priest River as a result of that request?

A. I did.

Q. Do you remember the day that you came?

A. I came on the 22nd of March, 1941.

Q. What did you do upon your arrival with respect to the discharge of Damschen?

A. Well, on my way from Spokane I stopped

(Testimony of Charles A. Paddock.)

and picked up [76] Clarence Butler, the president of the local, and drove to Priest River; and here we picked up Damschen; and then went down to the pole yard here in Priest River looking for Mr. Schaefer.

Q. At the pole yard did you have any conversation with anyone?

A. When we arrived at the pole yard we saw Mr. Conlee, Pat Conlee, the foreman, over in the yard directing some men. He was pointed out to me by Damschen from the car. Clarence Butler and I walked over where Pat Conlee was and told him we were looking for Mr. Schaefer and asked him where Mr. Schaefer was, and he told us that Mr. Schaefer was in Sandpoint.

Q. Did you, Mr. Paddock, identify yourself when you started your conversation with Mr. Conlee?

A. I am not sure that I did, I don't remember.

Q. Very well. State for us what conversation there was between you and Mr. Conlee?

A. I told Pat Conlee that we were looking for Mr. Schaefer to take up the matter of the discharge of Clifford Damschen. I told him that we felt that Damschen had been discharged on account of union activities and pointed out if that were so, it was a violation of the National Labor Relations Act. And I asked Pat Conlee why he had discharged Damschen, and he said they were reducing forces [77] and for that reason he discharged him, and

(Testimony of Charles A. Paddock.)

he said "We have a right to discharge men any time we want to." I said, "Yes, that is true, except you don't have a right to discharge a man on account of union activities." And I said, "In this case we feel that that was the reason for the discharge." He said,—or I said, "I think he was discharged because he joined the union. That is the way we feel." He said, "Has he joined the union?" He said, "I did not know that." I said, "Well, you must have known his attitude in regard to union organization because there was a meeting held here at which most of the employees were present and also the foremen were present, and for that reason you must have known the way Damschen felt about the union." And I don't remember whether he denied being at the meeting. I myself did not know Pat Conlee had been present at the meeting at this time, but I was informed that the foremen were there.

Q. You did not know what the name of the foreman was?

A. No, I did not know the foremen who were present.

Mr. Potts: That is, the name of the foremen who were present?

The Witness: No.

A. (Resuming) I asked Pat Conlee when he was going to put Damschen back on the job and he said, "We are not going to put him back on the job." And I said, "Why?" He said, [78] "That

(Testimony of Charles A. Paddock.)

is none of your damn business." And I said, "Well, we will make it some of our busniess if you are not going to give us some consideration. If you do not, then it is going to be necessary to take the matter up with the Labor Relations Board, and maybe they will have something to say about it, and maybe he will go back on the job." We had somewhat of an argument of the matter there. There were four or five men standing nearby, I think, who heard the argument, and that was about all of our talk at that time, I believe.

Q. When you left the pole yard, where did you go?

A. We went directly to Sandpoint and to the office of the Schaefer-Hitchcock Company.

Q. Did you have a conference with someone at the office of the Schaefer-Hitchcock Company in Sandpoint?

A. We did.

Q. State who was present at that conference?

A. Mr. Schaefer and Mr. Hitchcock, Mr. Damschen and Mr. Butler and myself.

Q. Did you and Mr. Schaefer do most of the talking at that time?

A. Yes, I think we did most of it.

Q. Will you tell us what was said in that conference and what happened there?

A. Well, as we went into the office Mr. Butler and Mr. [79] Damschen and myself, I introduced myself and Mr. Butler, and told Mr. Schaefer and Mr. Hitchcock that I represented the Carpenters

(Testimony of Charles A. Paddock.)

and Joiners International Union and that our organization had been attempting to organize his employees here at Priest River; and I related the fact that Clifford Damschen and one or two other employees had signed application cards upon the first visit of Ray Belden here, and that later an organizational meeting had bene held and that Butler understood the CIO had held one or two organizational meetings here; and I related to Mr. Schaefer and to Mr. Hitchcock that there had been a meeting held which was called by his foreman and attended by most of his employees, at which time the foreman had talked in opposition to labor organization by making various statements which I felt were discouraging the employees in joining a union, and at that meeting a vote was attempted to be taken to decide whether or not the employees would form an union, and that Clifford Damschen, who was a member of our union, had taken the floor and opposed the matter of a vote on the grounds that the men had not had an opportunity to hear the union's side of the argument, the discussion, and I stated that shortly after this occurrence Damschen was discharged from his job and to us it appeared like discrimination for union activities, and we asked for his reinstatement, asked that the company put him back on the [80] job. Mr. Schaefer denied any knowledge of the meetings that were held in Priest River. I asked him,—well, he told me this in regard to the meetings.

(Testimony of Charles A. Paddock.)

I asked him if he did not know of these meetings that had taken place in Priest River, and he said he had heard something about a CIO organizational meeting, and he had heard something about a beer party being held when his employees were present, but he denied any knowledge of Damschen having joined the union, and said if his foremen made any such statements as we claimed they had made, they were wrong in doing it; and he denied any knowledge further of any, and said that it would not have been right for them to do that, but he said the company, as far as they were concerned, were not a party to it. I then pointed out it was my belief under the National Labor Relations Act the company is responsible for the actions of their foremen in regard to discouragement of labor organizations or any acts in regard to the rights of employees to form a union.

Q. When you requested Mr. Schaefer to put Mr. Damschen back to work what, if any, reply did he make?

A. "Well," he said, "at any rate we would not consider putting him back on the tractor." And I said, "Why?" "Well," he said, "he is too rough in handling the tractor. We could not consider the matter of putting him back on the tractor." I then asked if there wasn't some other [81] work he could put Damschen at, and he said, "Well, I don't know. I will have to take it up with Pat Conlee." And we said, "Will you do that then?" And, "How soon can you do it?" And he said, "I will take the

(Testimony of Charles A. Paddock.)

matter up with Pat Conlee this afternoon, and I will let you know this evening what I may be able to do."

Q. Did any party there, if you now recall, say anything about wages?

A. Yes, Mr. Schaefer said that Damschen had been dissatisfied with the wages, and I believe his argument was that that justified him in discharging him. I said to Mr. Schaefer, "That is true. Damschen has been dissatisfied with the wages, and for that reason he was attempting to organize a union so that through the union they might come up with their committee and bargain with you on the matter of wages and hours and other conditions of employment." And I told him that that was what the National Labor Relations Act protected them in doing. He also stated that the company had just now raised their minimum wages from a 60 cent to a 65 cent scale.

Q. Did he state whether or not that was being put into effect, or do you recall?

A. I don't recall just what he said, only that they had only recently raised the wages from 60 to a 65 cent minimum wage. Mr. Schaefer also in our discussion stated that they [82] had recently purchased a pole yard at Bovill, which yard was organized previous to the purchase by the Schaefer-Hitchcock Company, and Mr. Schaefer stated that those employees expressed themselves to him that

(Testimony of Charles A. Paddock.)

they were glad now that they were going to be able to work there without having any union.

Q. Was it the understanding at the close of the meeting that Mr. Damschen would go to Mr. Schaefer's house that evening and get the answer as to whether he would be put back or not?

A. The understanding, as I recall it, was to the effect that Damschen was to contact Mr. Schaefer that evening. I don't believe it was said where, but he was to contact him that evening at Priest River and find out what Mr. Schaefer was going to do about the matter in regard to reinstating him.

Q. Did you receive word from Mr. Damschen that evening? A. I did.

Q. How did you receive this word?

A. Mr. Damschen called me by telephone at the Desert Hotel in Coeur d'Alene, where I was stopping.

Q. And what was his report to you?

A. He reported to me that Mr. Schaefer said he could not do anything about the matter of reinstatement at this time, that he might be able to do something later, or words to [83] that effect.

Q. That was on the 22nd of March, I believe you stated. Was it the result of your effort and this call from Mr. Damschen that you filed the charge on the 24th of March?

A. Yes, it was understood between Butler, the president of the local, and Damschen and myself—

(Testimony of Charles A. Paddock.)

Mr. Potts: I think I will object to that. That is clear outside the realm——

Trial Examiner McNally: What is the question? (Question read.)

Mr. Potts: I have no objection to the question, but I object to the answer, which goes into the conversation between Butler and Damschen.

Trial Examiner McNally: You may answer the question.

(Question read.)

Mr. Brooks: I will reframe the question.

Trial Examiner McNally: The question and answer may both go out.

Q. (By Mr. Brooks) Was it the result of your efforts on behalf of Mr. Damschen and this telephone call that you received from Mr. Damschen that you filed this charge? A. Yes.

Mr. Brooks: You may take the witness.

Trial Examiner McNally: Was the talk with Mr. Schaefer the same day that you talked with Mr. Conlee? [84]

The Witness: Yes, the same day.

Q. (By Mr. Brooks) In other words, you went from the pole yard in Priest River direct to Sandpoint, where you contacted Mr. Schaefer?

A. Yes.

Trial Examiner McNally: Will you tell us for the record who is eligible to apply to Local 2614?

The Witness: Anyone who is employed in the woodworking industry in the area around Newport,

(Testimony of **Charles A. Paddock.**)

whether it be men who work in a sawmill or logging camp or pole yard or other woodwork.

Trial Examiner McNally: What do you mean by "area around Newport". Can you define it a little more definitely?

The Witness: Mr. Examiner, there is no definite line as to how far out the local might reach for membership. It did and does yet include the area of Priest River. It includes the area at Cascade, another town 18 miles away from Newport. I would say just roughly——

Trial Examiner McNally: At all events, the Priest River employees would be eligible to join.

The Witness: That is right.

Trial Examiner McNally: Very well.

Cross Examination

Q. (By Mr. Potts) Mr. Paddock, you are not an officer or [85] member of Lumber and Sawmill Workers' Union Local 2614? A. No.

Q. The complaining union? A. No.

Q. And were not in March, 1941?

A. No.

Q. Your first contact with this matter in dispute was on March 22, 1941, when you made the trip to Priest River?

A. No, that was not my first contact with the case.

Q. It was your first contact with the situation in Priest River on that date? That is, you had not

(Testimony of Charles A. Paddock.)

been to Priest River before in connection with this matter? A. I believe not.

Q. So all the information you had as to the facts was information which had been given to you by other parties? A. That is right.

Q. And all the statements which you made to Mr. Schaefer at the office of the Schaefer-Hitchcock Company in Sandpoint on March 22, 1941, when you had your conference there, were statements based on what other people had told you?

A. That is right.

Q. You knew nothing about the accuracy of those statements, of your own knowledge?

A. That is right.

Q. So when you told Mr. Schaefer that this meeting had been [86] called by his foreman, you did not know whether or not that statement was accurate or not, did you, so far as any knowledge you had was concerned?

A. That is right.

Q. Now, as I understood your testimony regarding the conversation at Sandpoint, you say Mr. Schaefer said he had not heard anything about any union activities down here at the plant except that he had heard something about a CIO matter and a beer party?

A. No, I did not say that.

Q. Now, I want to get that a little more certain.

A. That was not my statement, not the way you asked the question.

(Testimony of Charles A. Paddock.)

Q. All I want is to get it accurately.

A. He said he had heard of a CIO meeting here in Priest River and he had heard of a beer party at which his employees were present. He disclaimed any other knowledge of organizational meetings of the union.

Q. And he stated that he would not consider putting Mr. Damschen back running the tractor in any event, didn't he? A. That is right.

Q. And he gave as his reason for that that he was rough with the tractor? A. That is right.

Mr. Potts: That is all. [87]

Trial Examiner McNally: Anything further?

Mr. Potts: Just a minute.

Trial Examiner McNally: Any further questions?

Mr. Potts: One question I overlooked, with your permission, Mr. Examiner.

Trial Examiner McNally: Proceed.

Q. (By Mr. Potts) Isn't it a fact that you did not disclose your union position or affiliation to Mr. Conlee when you went to the yard here, at all, at any time while you were there?

A. I am not sure about that. I would not say yes or no. I really don't know.

Q. Can't you remember that?

A. I really don't remember.

Mr. Potts: That is all.

Mr. Brooks: That is all.

(Witness excused)

JOHN WEBB,

a witness called by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brooks) State your name, Mr. Webb? A. John Webb.

Q. What is your mailing address?

A. Priest River. [88]

Q. Are you at the present time employed by the respondent Schaefer-Hitchcock Company?

A. No, sir.

Q. Have you been in the past?

A. Yes, sir.

Q. When did you leave the employ of the respondent?

A. I believe it was May 12 of this year.

Q. Voluntarily, of course? A. Yes, sir.

Q. Are you presently employed?

A. Yes, sir.

Q. By what company?

A. By the B. J. Carney Company.

Q. Were you working for the Schaefer-Hitchcock Company at its pole yard in Priest River in February, of 1941? A. I was.

Q. How long have you worked for the respondent?

A. I think it was either in 1928 or '30 I began working for the Schaefer-Hitchcock Company. I would not be sure definitely, but I believe it was 1930, though.

(Testimony of John Webb.)

Q. You started working when this company started operating in this yard here, didn't you?

A. No, I worked for M. L. Bruce Company previously, and Mr. Bruce was killed in a car accident, and the Schaefer-Hitchcock Company bought his interest, and they asked me if [89] I would continue to work for them.

Q. But you think it was 1930?

A. I think it was 1930.

Q. Directing your attention,—first, I will ask you do you know Mr. Con Wear?

A. I do.

Q. Mr. Con Wear was in February, 1941, employed by the respondent here at Priest River, was he not?

A. He was.

Q. What was his job with the company at the pole yard?

A. I would have called him a straw boss.

Q. What did he do from your observations?

A. Well, they have a hoist down there, and he run that once in a while, but most of the time he was just around the yard.

Q. Did you hear him give orders?

A. I did.

Q. Did he ever give you orders?

A. He did.

Q. And in your experience with the company, has Mr. Conlee, the foreman, been off duty for a day or more at different times?

(Testimony of John Webb.)

A. Yes, I can remember of a few times he was away from there, I think two or three days, and sometimes a day or two. [90]

Q. Do you know on those occasions who, if anyone, replaced him as being in charge of the pole yard? A. Con Wear did.

Q. Directing your attention to February, 1941, do you recall having a conversation with Mr. Wear at which time the question of unions was brought up? A. You said previous to that?

Q. During the month of February.

A. During the month of February?

Q. Yes, of 1941. A. Yes.

Q. Can you tell us the date any more accurately than just about the month of February?

A. Yes, I think I can. I believe it was about the fourth day before that meeting was held at the Peterson Hotel.

Q. That has been placed as the 15th of February, and if it was four days previous, it would be the 11th, is that right?

A. That would be correct. That would be very near it.

Q. Where did this conversation occur?

A. In what we call the upper yard of the Schaefer-Hitchcock Company yard. It is this side of the railroad tracks.

Q. During working hours?

A. During working hours.

(Testimony of John Webb.)

Q. Was there anyone else present at the conversation right near you? [91]

A. Well, his brother-in-law Morley Morrow was about 40 feet away, I would say. He was at one end of the pole and his brother-in-law was at the other end, and Con Wear was standing right close to me.

Q. This other person is Morrow?

A. Morrow. (spells it.)

Q. Will you tell us what was said in that conversation?

Mr. Potts: Objected to for the reason that it does not appear that this witness was in any sense a representative,—or rather, it does not appear the conversation which the witness is asked to testify about was with anyone who was an officer or representative of the respondent company.

Trial Examiner McNally: Objection overruled. The witness may answer.

A. The same day that this conversation took place,——

Trial Examiner McNally: What is the question?

(Question read.)

Q. (By Mr. Brooks) Tell us what the conversation was, if any, and if it needs explanation, you may then explain it.

A. All right. He asked me when he came up if I knew that CIO organizer that came to the boiler room that day, and I told him that I did not. "Well," he said, "he was from Sandpoint." "Yes." I said, "I heard him make that statement, but I

(Testimony of John Webb.)

don't know him." And he asked then what I thought about the union, and I told him I figured that it [92] had come to a point where a union was necessary. And he asked me why I thought that, and I said I understood the way a lot of these matters were handled, that with material shipped by non-union labor, union labor could very well refuse to accept it or handle it, and it would be very possible that in Mr. Schaefer's business some poles would be shipped some place sometime and that condition would come up. And he told me then that until that condition did come up it was better to let that alone, and if it did come up, then Mr. Schaefer could advise us to join a union, and what union.

Q. Was that all, as far as the substance of that conversation was concerned, with reference to unions? A. That was all.

Q. Were you a few days after that invited to attend a meeting of the employees of the respondent on the 15th day of February?

A. I was.

Q. Who invited you? A. Con Wear.

Q. Where were you when you got this invitation?

A. I was at the door of the boiler room. I had just come out of there headed for home.

Q. State what Mr. Wear said and what you said?

A. Well, he told me they were going to have a meeting at [93] the Peterson Hotel to decide

(Testimony of John Webb.)

whether or not they would have a union, and he would like to have me attend, and I told him I had quite a bit of work I was doing around home, and I felt that there wouldn't be anything said there that would be of sufficient interest for me to come.

Q. Was that the end of that conversation?

A. That was the end of that conversation.

Q. Did you go to the meeting? A. I did.

Q. Approximately how many employees of the respondent were present at that meeting?

A. Well, I would say somewhere about twenty.

Q. Will you state for us what transpired and what was said in that meeting of February 15 at the Peterson Hotel?

A. Well, as I remember it, we sat around in there for quite a little while, and finally one party made the remark that we should dig into the matter of the union if we were going to. And I believe then that Con Wear made the statement that Mr. Conlee was present and he had had quite a bit of experience with unions back east, and he could probably tell us something about it. And shortly after that Clifford Damschen made the remark he figured it would be a one-sided affair if there wasn't some sort of representative there from the union who knew a lot about it, and Mr. Conlee made the remark that no matter what was [94] asked they always knew the answers, and he said they could paint a very rosy picture, but it hardly ever developed. And he told about back East. The boys

(Testimony of John Webb.)

had had a union there and they had been out on strike quite a bit of the time, and he felt they had really lost more by the union than they had made.

Q. Did Mr. Conlee state where back East?

A. I don't think he did. I think he just said back East.

Q. Do you recall now anything else that Mr. Conlee said at that meeting?

A. I believe that is all that I can recall.

Q. Do you recall George Cronkright saying anything? A. Yes.

Q. Do you recall what he said?

A. He mentioned the fact that at Bovill they had had a union and the Schaefer-Hitchcock Company purchased that yard at Bovill about the first of the year and that the boys had gone back to work for the Schaefer-Hitchcock Company without any union and seemed glad to do it.

Q. And seemed to be glad to do it?

A. I believe that was the way it was stated.

Q. Do you recall any proposal for a vote to be taken at that meeting? A. Yes.

Q. What was said in that regard? [95]

A. Clifford Damschen objected to that. He made the remark he felt it was not representative of both sides enough to give the parties a clear picture of what it was actually, and he figured a vote was out of order.

Q. Did anyone present other than Damschen say anything in favor of unions?

(Testimony of John Webb.)

A. Not that I know of or recall.

Q. Do you recall the date that Clifford Damschen was dismissed from the employ of the respondent company?

A. Yes, I am quite sure I do. I think it was March 19.

Q. You recall hearing about it that day, do you?

A. I didn't really know about it until the next morning.

Q. Do you know whether or not anyone else was laid off, discharged or dismissed from the employ of the respondent company at the Priest River plant on that date, March 19, that Damschen was discharged?

A. No, I don't know of anyone else being laid off near that date.

Mr. Brooks: You may take the witness.

Cross Examination

Q. (By Mr. Potts) You told Con Wear during the conversation on February 11 that you were in favor of the union, didn't you?

A. I did not say I was in favor of the union. I told him that I thought it had come to the point where a union would [96] be necessary. Of course, in a roundabout way, that is saying it.

Q. In other words, you were arguing in favor of the union?

Mr. Brooks: I object to that as calling for a conclusion of the witness. He may state what was said,

(Testimony of John Webb.)

but it is purely a conclusion as to whether it was an argument and whether he was arguing in favor of the union.

Trial Examiner McNally: What was the question?

(Question read.)

Trial Examiner McNally: He may answer.

The Witness: I think I did answer that, didn't I?

Trial Examiner McNally: Have you told us just exactly what was said?

The Witness: Well, he asked me if I had argued for the union, and I told him that I had said that I thought it had come to a point where a union was necessary. Does that answer the question?

Trial Examiner McNally: Well, is that all you said in connection with the union at that conversation?

A. No, I stated before what I had said. I did not know it would be necessary to repeat it again. But I——

Q. (By Mr. Potts) It will be necessary to answer the questions as long as the Examiner holds they are proper.

A. All right. To complete it then, after I had said I had thought it had come to the point where I thought a union was necessary, that it was possible for material [97] to be shipped and union labor at the other end refuse to handle it because it was loaded by non-union labor to begin with and

(Testimony of John Webb.)

that I thought on that ground Mr. Schaefer might possibly get caught that way, and then Con said that in a case like that it would be better to wait until it did come up, and if it did, that Mr. Schaefer then would tell us whether or not we should join a union to take care of that and what union.

Q. And what did you reply to that, if anything?

A. There was no more replies or questions.

Q. Now, that was the whole conversation as you narrated it, was it? A. Yes, sir.

Q. You remember it distinctly?

A. I think I do, yes, sir.

Q. You did not have any other argument in favor of the union that you have not mentioned, other than the benefit to the employer?

A. Well, that could be taken either way, absolutely, yes, sir.

Q. You did not mention anything else in the way of argument?

A. I did not mention anything else.

Q. Now, you attended this meeting on the 15th, four days thereafter, in the same frame of mind, didn't you? You [98] had not changed your mind any, had you?

A. I don't believe I had, no.

Q. So when you attended that meeting during the time you were present there, you were in favor of the union, weren't you?

Mr. Brooks: I think that is immaterial.

(Testimony of John Webb.)

Trial Examiner McNally: He may answer.

A. I wanted to find out. I did not know much about unions. I did not pretend to know then, and I don't pretend to know much yet, but I wanted to find out.

Q. (By Mr. Potts) Did you find out anything?

A. I did not find out anything there.

Q. You did not hear a thing to influence you one way or the other, did you?

A. At that meeting?

Q. At that meeting.

A. Well, I can't say that I was too much influenced one way or the other by what I heard there.

Q. Were you influenced at all by anything you heard there? A. Well, I will tell you——

Q. Just answer the question, please.

A. I was rather disgusted, rather than influenced.

Q. Then you were not influenced. You were not influenced by anything that you heard there?

A. If so, not very much. [99]

Q. You did not express yourself at that meeting at all? A. No, I did not.

Q. Did you engage in any conversation?

A. Well, part of the time there was just visiting going on there other than at the time the union itself was under discussion.

Q. All the time it was just a conversation, wasn't it? Nobody got up and made a speech, did he?

(Testimony of John Webb.)

A. No, not actually a speech,—I wouldn't call it.

Q. They just talked from where they sat in the chair or on the floor, didn't they?

A. Well, I believe there was two times that they stood up to address the crowd.

Q. Who stood up?

A. Mr. Con Wear stood up at the time he introduced Mr. Conlee, and George Cronkright stood up when he was talking about the union at Bovill.

Q. Mr. Conlee did not stand up, did he?

A. No, he sat on the floor.

Q. And what he said he just said in an ordinary conversational tone of voice?

A. Yes, I would say that.

Q. And did others engage in the discussion while Mr. Conlee was talking?

A. Well, Clifford did,—Clifford Damschen.

[100]

Q. And there was no argument, was there?

A. Well, I don't know whether you would call it an argument or not. I don't suppose you would call it arguing.

Q. Mr. Damschen suggested that since the union did not have a representative there, they should not have a vote? Isn't that where he came into the picture?

A. Yes, he suggested that.

Q. Had anybody suggested that they take a vote?

A. Yes.

Q. Who was it?

(Testimony of John Webb.)

A. I don't know who made the suggestion.

Q. It was not Pat Conlee, was it?

A. You mean Pat Conlee made the suggestion that we take a vote?

Q. He didn't make the suggestion?

A. No.

Q. Con Wear didn't make it, did he?

A. I don't remember for sure who it was. Somebody made the suggestion. It seems to me Ed Gillespie said that, but it might have been Con Wear. I don't know for sure.

Q. But whoever it was who made the suggestion, upon Mr. Damschen objecting to it, the idea was abandoned, wasn't it, right then and there? No vote was taken.

A. No vote was taken.

Q. And no further discussion. That just ended it?

A. Yes, I think that was about the end of it.

[101]

Q. What is your recollection as to how this meeting progressed as to who started the discussion about the union?

A. Well, Ed Gillespie, I believe, was the one who mentioned the fact that we should get busy on talking about the union if we were going to do anything about it.

Q. And following that suggestion did different ones express their opinion?

A. Well, I don't think so. I think it was practically as I told you before except after there was no vote I think there was two or three who made

(Testimony of John Webb.)

the remark that we could get along all right without a union, and I guess we can yet.

Q. Now, at that meeting I believe you said that you thought there were about 20 there?

A. Yes, somewhere about 20.

Q. And do you recall how many employees there were in the plant on that day?

A. Well, I imagine,—I never actually counted them there, but I would say probably 25 or 26.

Q. To the best of your knowledge all the employees were present at that meeting except four or five,—something like that?

A. Yes, that would be about right.

Mr. Potts: That is all.

Redirect Examination [102]

Q. (By Mr. Brooks) Mr. Webb, you have appeared here today and testified pursuant to a subpoena, have you? A. I have.

Mr. Brooks: That is all.

Examination

Q. (By Trial Examiner McNally) Mr. Webb, how much time elapsed between the time you went into the Peterson Hotel and when the crowd left?

A. Well, I don't believe I could tell you definitely. I don't believe I had my watch with me. I left my watch in my work clothes, and I never looked to see what time it was, but I would say we were there probably five hours. There was only part

(Testimony of John Webb.)

of that period—I think maybe somewhere between half and three-quarters of an hour—that the conversation was about unions, and then after that it was a party.

Q. Whose party was it?

A. I don't know.

Q. What did you have to do with it?

A. Well, I helped to drink the beer.

Q. Did you pay for your share?

A. I never paid anything, no, sir.

Q. Who did pay, do you know?

A. I don't know.

Q. Did you see anybody pay for beer that night?

[103]

A. I heard a couple of remarks made that would lead me to believe who paid for a couple of cases, but I did not see who paid for it, so I could not say that that is right.

Q. As far as you could see, the beer was not paid for that evening?

A. Well, it was paid for out at the bar. We were in a room at the back end, and the beer was carried in there in cases.

Q. You don't know who did pay for it, but you did not pay for what you had?

A. That is correct.

Trial Examiner McNally: Anything further?

(No response.)

(Witness excused.)

Mr. Brooks: That concludes the evidence that I have to offer, Mr. Examiner, and with the usual motion that is made in these proceedings to amend the complaint to conform to the proof, I rest. I will state, of course, that this has to do with formal matters and is not to add any substance to the complaint.

Trial Examiner McNally: Any objection to the motion?

Mr. Potts: Well, I object to a motion the purport of which is not stated. If there are any motions to be made, it seems to me they should be stated.

Mr. Brooks: My thought, Mr. Examiner, is in event there are some typographical, clerical, or formal errors [104] such as dates, spelling and so so forth as to which the proof varies from the complaint, this motion is to take care of that. As I stated, it is not to add any additional substance to the complaint.

Trial Examiner McNally: With that amplification, Mr. Potts, what do you say?

Mr. Potts: If it is restricted to formal corrections only, I have no objection to it.

Mr. Brooks: It is so restricted.

Trial Examiner McNally: The motion is granted.

Mr. Potts: Call Mr. Cronkright.

GEORGE WILLARD CROCKRIGHT,

a witness called by and on behalf of the Respondent Schaefer-Hitchcock Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Potts) State your full name.

A. George Willard Crockright.

Trial Examiner McNally: Will you spell your last name?

The Witness: C-r-o-n-k-r-i-g-h-t (spells it).

Q. (By Mr. Potts) Where do you reside?

A. Priest River.

Q. Are you employed by the Schaefer-Hitchcock Company at its pole plant in Priest River?

[105]

A. Yes, sir.

Q. How long have you been employed there?

A. 17 years.

Q. During what part of that time has your employment been with this company?

A. The whole time.

Mr. Brooks: I will stipulate he is in error, Mr. Potts, to make it simpler.

Q. (By Mr. Potts) It is my impression, Mr. Cronkright, that the Schaefer-Hitchcock Company did not have this pole plant prior to 1930?

A. That is right.

Q. So let's get it accurately.

A. All right.

(Testimony of George Willard Cronkright.)

Q. Prior to that time when they acquired the plant, you were working for whom?

A. For Mr. Schaefer and Mr. Hitchcock at Kaniksu Cedar Company.

Q. So your statement you have been working for this company 17 years is correct, is it?

A. That is right; I believe it is.

Q. Now, during the months of February and March of the present year what work were you doing?

A. Inspecting.

Q. Inspecting what?

A. Poles. [106]

Q. And where?

A. In the Priest River yard. Sometimes I was in the Bovill yard, and sometimes in Potlatch Forests and part of the time at Soldier Creek.

Q. Well, during these two months where did you spend most of the time, February and March of this year?

A. Soldier Creek.

Q. How much of your time was spent in the Priest River yard?

A. Very little.

Q. You were here about the middle of February, were you,—that is, sometime about the 15th of February?

A. Yes, sir.

Q. Were you here any considerable length of time before that date?

A. Not steady,—not to say I was in the yard for 15 or 20 days at a stretch because I was not.

Q. Do you recall a meeting of some kind which was held in Priest River on February 15, 1941 by

(Testimony of George Willard Cronkright.)

the employees of the Schaefer-Hitchcock pole plant? A. Yes, sir.

Q. Did you have anything to do with arranging that meeting? A. I did.

Q. Just what did you do?

A. Well, nothing more than to try and get the boys [107] together and talk the proposition over.

Q. Did you discuss it with anyone else and take some part in arranging the meeting or getting them together?

A. Well, I and Con Wear got them together.

Q. Do you know of anybody else participating in the preliminaries?

A. Ed Gillespie, I believe.

Q. How did you go about getting them together?

A. Well, just told them we would gather up at the Peterson Hotel and would talk the proposition over.

Q. Well, did you take that up with any of the crew or individually?

A. Oh, not individually; just around throughout the yard, whoever happened to be working with me.

Q. How many did you see?

A. How is that?

Q. How many boys did you see about attending the meeting?

A. Oh, gosh, I cannot tell you. It is not easy to tell exactly.

Q. Now, did Mr. Conlee make any suggestion to you about having such a meeting?

(Testimony of George Willard Cronkright.)

A. No, sir.

Q. Did he talk to you about it at all?

A. No, sir.

Q. Or did you talk to him about it? [108]

A. I asked him to come up there.

Q. Oh, you asked him to come up?

A. I did.

Q. What did he say?

A. He said that he did not know: I told him I thought it would be pretty nice for him to come up there and sit in, that he would see how the boys felt.

Q. Did he finally say whether he would or would not?

A. I don't remember whether he told me he would come or not.

Q. However, when the meeting was held he did come? A. Yes.

Q. Now, were you present at the meeting?

A. Yes, sir.

Q. Do you know who bought the beer?

A. I know who bought some of it. I paid for some of it.

Q. Did you pay for it with your own money?

A. I certainly did.

Q. How did you buy that beer; bottles or cases?

A. Well, two cases at a time.

Q. Do you know who bought other cases?

A. Yes.

(Testimony of George Willard Cronkright.)

Q. Did you see them pay for it?

A. No, I seen them order it.

Q. As far you know, did Mr. Conlee buy any beer at that meeting? [109]

A. No, sir.

Q. Or did the Schaefer-Hitchcock Company buy or pay for any beer at that meeting?

A. No, I don't think so.

Q. Now, will you tell us in your own words just what happened at that meeting, as you remember it?

A. Well, we just gathered in there and sat around and talked, and eventually it was brought up that we should go ahead and discuss the proposition which we did, and we discussed it back and forth across the room.

Q. What proposition?

A. Of whether we should unionize or not.

Q. How was it discussed?

A. Well, about the same as if we sat around here and started talking about shooting a deer, and everybody would have something to say.

Q. Is it your recollection a few or many persons participated in the conversation?

A. Well, as I remember it, pretty near everyone had a little something to say. There may have been a few, a half dozen or so, who did not say anything.

Q. Was there any chairman of the meeting selected or appointed?

A. No, I don't think so.

(Testimony of George Willard Cronkright.)

Q. Nobody presided at the meeting? [110]

A. No, sir.

Q. When anyone present talked did he, or did he not, get up and address anyone in particular?

A. No.

Q. Did you hear Mr. P. J. Conlee, the foreman at the plant, say anything at that meeting?

A. I did.

Q. Where was he when he said it?

A. Sitting on the floor with his legs crossed.

Q. How did he come to engage in the conversation?

A. I believe someone asked him if he would say a few words, that he probably had been more acquainted with the unions than we had.

Q. And did he respond and say something?

A. Yes, he said,—well, he said, “Before I say anything I want to say this much, the company is not opposed to union labor.” And then he went ahead and told us he had had an experience. I believe, in Minneapolis where it did not turn out so good, that they went on strike and was on strike for a certain length of time and gained nothing.

Q. Do you remember anything else that he stated? A. Pardon?

Q. Do you remember anything else that he said?

A. No.

Q. Did anyone else make any remark or statement in reply [111] to what Mr. Conlee said?

(Testimony of George Willard Cronkright.)

A. Yes, Mr. Damschen said—I don't know if I can quote him exactly, but anyway he said he did not think we should take a vote upon it because there was no one there to speak for the union.

Q. And when he made that statement what happened to the vote?

A. There was none. Somebody ordered two cases of beer.

Q. Was that the end of the discussion about unions? A. Yes, sir.

Q. You did not hear anything further about unions that evening? A. No, sir.

Q. Did you hear anything more about unions from then on during the month of February or month of March around the plant?

A. Well, I was not around the plant much after that.

Q. When you were there did you hear any discussions of the union? A. No, sir.

Q. Did you observe any activity in connection with the union? A. No, sir, none.

Q. Now, let's see, you made some remarks at this meeting, didn't you?

A. Yes, I talked a little. [112]

Q. What did you say?

A. I don't remember all that I said.

Q. Do you recall saying something about the Bovill plant recently purchased by the Schaefer-Hitchcock Company having had a union while it was owned by the former owner? A. Yes, sir.

(Testimony of George Willard Cronkright.)

Q. And since then that they had not had a union?

A. Yes, and I stated I was there when the men went back to work and they seemed to be glad to go back to work.

Q. Did you make any other remarks on the subject? A. I don't believe so.

Q. Did you know at the time you attended that meeting that Mr. Clifford Damschen had either joined the union or was a union man in any way?

A. No, sir.

Q. Did you know at any time afterwards while you were around the plant before March 19th?

A. No, sir, and I don't know it now.

Q. Had you heard anything to that effect?

A. No, sir.

Mr. Potts: You may take the witness.

Cross Examination

Q. (By Mr. Brooks) What is your rate of pay, Mr. Cronkright? A. 80 cents an hour.

Q. How long have you been getting 80 cents an hour? [113] A. Since January 1, 1941.

Q. The company put a general raise in effect about the 1st of April?

Mr. Potts: The 1st of April.

A. Yes.

Q. (By Mr. Brooks) Which was it?

A. What is that? I wasn't in the yard at that time.

(Testimony of George Willard Cronkright.)

Q. You did not get a raise at that time, though?

A. No, sir.

Q. When you went to Bovill were you inspecting poles there? A. Yes.

Q. Were you sent there at the time the company began the operation of the plant?

A. That is right.

Trial Examiner McNally: Who sent you?

The Witness: Well, the company did.

Q. (By Mr. Brooks) What individual asked you to go?

A. Well, I don't know whether it was an order from the office, or—I believe it was an order from the office.

Q. Do you remember who told you about it?

A. No.

Q. Did you have written instructions on what you were to do when you got there?

A. No, I went over there to meet a guy from the East who was coming out there to buy some poles. [114]

Q. And what were you to do with respect to——

A. Work with the inspector.

Q. And determine the grade of pole and so on?

A. You are right.

Q. How much beer did you buy that night? You said you bought some of it.

A. I bought two cases.

Q. Were they these stubby bottles?

(Testimony of George Willard Cronkright.)

A. They were pint bottles,—12 ounce bottles or 11 ounces. I can't say which.

Q. 24 to the case? A. That is right.

Q. Did you drink all that beer yourself?

A. I drank my share of it.

Q. Did you drink all of it?

A. Oh, no, I don't think I did.

Q. How much did that cost a case?

A. I believe it was \$3.20 a case.

Q. You spent \$6.40 for beer?

A. That is right.

Q. You spent it out of your pocket?

A. That is right.

Q. Do you know who else paid for any beer?

A. Yes, Charlie Theobald.

Q. Does he work for the company? [115]

A. Yes, sir.

Q. What is his job? A. Common laborer.

Q. Who else bought some that you know of?

A. One of the McInnises bought some,—maybe both of them; I don't know. There were two of them. I am not sure whether Clifford did or not, but there was beer coming so fast I couldn't tell you any more. Charlie Theobald was the first one.

Q. Did you start drinking beer before the discussion ended about unions? A. No.

Q. Did you have to pay for the use of the room in the hotel? A. No.

Q. Did you make arrangements to use the room?

A. Yes.

(Testimony of George Willard Cronkright.)

Q. Were you the first one to get the idea about having this meeting? A. Oh, no.

Q. Who mentioned it to you?

A. I could not say.

Q. You don't remember the first time you heard about it?

A. It was talked of two or three days before we got around to having a meeting.

Q. You were in favor of having this meeting?

[116]

A. Certainly.

Q. Had you heard there had been union talk around among the employees? A. Yes.

Q. When did you hear that?

A. Around there.

Q. I say when?

A. I would say two or three or four or five days before that.

Q. And you and Con Wear talked about it?

A. Only to the extent that we should get together, and if we were going to unionize, go ahead and unionize; otherwise, we would not.

Q. Who suggested the place to have it?

A. I believe I did.

Q. You told Con Wear you thought that would be a good place to have it? A. Yes.

Q. Did Con Wear go with you to make arrangements?

A. I believe he was with me when I made the arrangements.

(Testimony of George Willard Cronkright.)

Q. You asked Mr. Conlee to come to the meeting? A. I did.

Q. What did you say to him when you asked him?

A. I just asked him if he did not want to come up to the meeting.

Q. And you told him what? [117]

A. I told him what we were going to do.

Q. You told him you were going to discuss the union?

A. Discuss the possibilities of whether we would unionize or not.

Q. I believe you stated Mr. Conlee mentioned something about Minneapolis, or his experience in Minneapolis?

A. I believe it was Minneapolis. It was east, and I believe it was Minneapolis.

Q. Was that while he was working for the company in Minneapolis? A. I could not say.

Q. You don't know whether it was the Schaefer-Hitchcock Company in Minneapolis? A. No.

Q. Do you know whether or not Mr. Conlee ever worked for the Schaefer-Hitchcock Company in Minneapolis?

A. I think he did. I don't know for sure. I did not know Mr. Conlee until he came here.

Q. I believe you stated your rate of pay now is 80 cents an hour? A. That is right.

Q. Did anyone reimburse you later on for any part of that \$6.40 you spent for beer?

(Testimony of George Willard Cronkright.)

A. No.

Q. You did not take up any collection among the fellows [118] to give you some help? A. No.

Q. When you were at Bovill at the time the men came to work for the first time for Schaefer-Hitchcock how did you find out that they were glad to come back without the union?

A. I believe Mr. Galway told them that,—that is the foreman and was the foreman when the other company had it——

Q. Yes.

A. And he told them if they wanted to unionize that the company was not opposed to it.

Q. I say, how did you learn that they were happy that there was no union?

A. I would say they were pretty well satisfied to go back to work without the union.

Q. You heard several of them say that?

A. Yes, I talked to them as they were working.

Q. Can you tell me how long it was prior to the date of this meeting that you first got the idea that it would be a good idea to get the boys together to discuss it?

A. Only a few days, four or five days.

Q. And Con Wear was the first man you talked to, wasn't it?

A. No, I think Ed Gillespie was the first one I talked with. [119]

Q. You and Con Wear were together making most of the arrangements, weren't you?

(Testimony of George Willard Cronkright.)

A. No, we weren't.

Q. Who assisted you besides Con Wear in making the arrangements?

A. What arrangements do you mean?

Q. The arrangements for the meeting.

A. We just went around to the men we were working with, and while I asked one man that man might turn around and ask another,—understand?

Q. Yes, but you and Con Wear agreed that that was the way to do it? A. Yes.

Redirect Examination

Q. (By Mr. Potts) When did the party idea strike the crew there? Was it contemplated before that you were going to have a party during the course of the meeting or did it arise after you had gathered there?

A. I believe it was decided after we were there that we were in a good place to drink beer.

Q. What is your idea as to how many employees who were then working were actually present at that meeting? A. All but four or five.

Mr. Potts: That is all.

Mr. Brooks: That is all.

(Witness excused.) [120]

Trial Examiner McNally: We will recess for ten minutes.

(Whereupon a short recess was taken, after which proceedings were resumed as follows:)

Mr. Potts: Call Con Wear.

CON WEAR,

a witness called by and on behalf of the Respondent Schaefer-Hitchcock Company, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Potts) Please state your full name or the name that you generally go by?

A. Con L. Wear.

Q. And your residence, Mr. Wear?

A. Priest River, Idaho.

Q. How long have you lived in Priest River?

A. Since July of 1929.

Q. Are you now employed by the respondent Schaefer-Hitchcock Company? A. I am.

Q. How long have you been employed by that company? A. Since 1930.

Q. During that time where have you been employed by the company? Where have you done your work? A. At Priest River.

Q. In the pole plant that they maintain and operate in [121] Priest River? A. Yes, sir.

Q. Are you the Con Wear who has been mentioned here during this proceeding? A. I am.

Q. What do you do? What is your work? What kind of work have you done during the past year or two in that pole plant?

A. I am running both the jammers,—both gas jammers, and I have inspected poles, and I have loaded poles.

(Testimony of Con Wear.)

Q. During the last year or two or several years, for that matter, have you had any particular job that you worked at all the time, or have you worked at different jobs in the yard?

A. I have worked at different jobs most of the time.

Q. Is there any one job that you have worked at more than another? A. I don't think so.

Q. Now, have you been a straw boss in that yard? A. No, I have not.

Q. Have you had any authority in the yard as to giving orders?

A. No, I have taken my orders from Pat Conlee.

Q. And what was your rate of pay during 1940?

A. 75 cents an hour.

Q. What is your present rate of pay? [122]

A. 80 cents.

Q. When did the increase become effective?

A. I would not say for sure. I believe it was in April, but I would not say for sure.

Q. Anyhow during the spring of this year,—1941, you mean? A. Yes.

Q. Did you receive an increase of five cents an hour? A. I did.

Q. Was there, or wasn't there, a general increase in the plant at that time, at the same time you got your increase? A. There was.

Q. Did you have a conversation with Mr. Clifford Damschen sometime prior to the meeting that was held in the Peterson Hotel at Priest River on

(Testimony of Con Wear.)

February 15, 1941,—during that week or a few days preceding that, that you recall?

A. I believe I asked him if he was going to come up, that we were all going to get together at the Peterson Hotel.

Q. Do you recall the date of that conversation with reference to the meeting?

A. I believe it was the same day as the meeting.

Q. Do you recall where you saw him?

A. I am not sure where I saw him.

Q. What is your recollection of the conversation, or haven't you any? A. I haven't. [123]

Q. Do you remember whether anyone else was with you when you saw him?

A. I don't remember that either.

Q. Do you recall what he said, if anything?

A. No, I don't.

Q. Do you recall anything about your making a statement to the effect that it was going to be a friendly talk or chat among the workers?

A. I believe there was something mentioned that we were all getting together, that we had never been together, all of us at one time since we had worked there.

Q. Now, had you talked to anyone else about this meeting before the day of the meeting, that is, any of the other employees, about arranging the meeting or had anyone talked to you?

A. Yes. I believe George Cronkright and I talked about it.

(Testimony of Con Wear.)

Q. Mr. Wear, when did you first hear of the proposition to have this meeting?

A. I don't know whether it was two or three days or three or four days before the meeting.

Q. From whom did you hear about it?

A. George Cronkright, and I believe, Ed Gillespie.

Q. Do you recall just how it came about, as to who first mentioned it or what the circumstances were? A. No, I can't. [124]

Q. What did you do about it in the way of communicating with others of your fellow workmen there?

A. I believe Mr. Cronkright spoke to several of them and——

Q. Did you tell any of them?

A. I don't remember who I asked. I think I asked certain ones. I asked John Webb if he was going to attend, and he said he did not know if he would or not, and it probably would not amount to anything anyway.

Q. Had you had any conversation with Mr. P. J. Conlee, the foreman, in regard to this meeting at any time before it was held? A. I did not.

Q. Had he ever suggested to you that there be such a meeting? A. He had not.

Q. Or had anybody connected with the Schaefer-Hitchcock Company? A. No, sir.

Q. Do you know whether or not the idea of having a party there in connection with or following the

(Testimony of Con Wear.)

meeting was mentioned before the meeting was actually held?

A. You mean that we were to have a party after the meeting was held?

Q. Yes.

A. I think most everyone intended it to be that way. [125]

Q. Was that what you had in mind?

A. I did.

Q. Well, were you at the hotel when the meeting got together,—when the boys got together at the meeting? A. I was.

Q. And of the men who were then working at the plant how many of them do you think were there?

A. I don't know exactly; perhaps 20; I would not say for sure. I never counted them.

Q. Did you notice whether most of them were there?

A. Most of them were there; all but five or six.

Q. And did you observe that Mr. Conlee, the foreman, was there at any time during the meeting?

A. He was.

Q. Did you know until you saw him there that he was going to be there? A. I did not.

Q. What, if anything, did you do with reference to asking Mr. Conlee to make any remarks during the course of the meeting?

A. Well, the boys had been talking and visiting together and someone suggested that they should

(Testimony of Con Wear.)

see what they should do about union, and no one seemed to say anything, and I asked Mr. Conlee, maybe he knew more about it than the rest of us, about unionizing, that none of us knew anything [126] about it.

Q. Then what happened?

A. He told all of us that we should understand that the company was not opposed to organized labor, and what little business he had had with the union, he did not know whether they had benefited by it or not; he would not say.

Q. Did he mention anything in particular that you recall about his experience other than what you have just stated?

A. He said that they went out on strike for quite a while, and he did not know as they had benefited by striking.

Q. Then did Mr. Damschen say anything that you recall?

A. I don't recall that he did.

Q. Well, after Mr. Conlee had made his remarks did anyone else participate in the conversation or discussion?

A. Someone made the suggestion that we should vote on it, and Mr. Damschen figured that that would not be the right thing to do; so there was no vote taken and no argument about it.

Q. And after Mr. Damschen made his objection did anyone insist or argue again for a vote?

(Testimony of Con Wear.)

A. No.

Q. And then what happened?

A. We drank beer from that time on.

Q. That was when the beer was called for?

A. That is right. [127]

Q. Do you remember who bought the beer?

A. Well, most everyone that was there bought beer.

Q. Did you? A. I did.

Q. Buy a case or more?

A. I bought two cases.

Q. Did you pay for it? A. I did.

Q. With your own money? A. I did.

Q. Who else bought cases of beer?

A. I believe George Cronkright and Charlie Theobald. I don't remember who else.

Q. By the way, did Mr. Conlee stay for the party afterward, or did he leave? A. He left.

Q. Did anyone else leave at that time, or did they all stay, or did some leave?

A. I believe everybody stayed, all but Mr. Conlee.

Q. I beg your pardon?

Trial Examiner McNally: All but Mr. Conlee.

A. All but Mr. Conlee. Mr. Conlee did not stay.

Q. (By Mr. Potts) How long did they stay?

A. I don't know. I stayed there until,—I don't know what time it was when I went home with Mr. Damschen. [128]

(Testimony of Con Wear.)

Q. You and Mr. Damschen left at the same time, did you? A. That is right.

Q. And the party had not broken up at that time? A. No.

Q. That was Saturday evening, wasn't it?

A. Yes.

Q. And you had recovered sufficiently so that you went to work Monday morning, had you?

A. Yes.

Q. From then on did you hear anything around the plant or yard about union or union activity?

A. I never did.

Q. Did you see Mr. Damschen as he was working there in the yard from time to time from then on until the 19th of March? A. I did.

Q. Did you observe any activity on his part in connection with organizing a union, or anything of the kind?

A. I never heard him say a word about unions.

Q. Did you hear anybody else talking it?

A. I did not.

Q. Did you know Mr. Damschen was a member of the union at any time during that period?

A. I did not.

Mr. Potts: You may cross examine.

Cross Examination [129]

Q. (By Mr. Brooks) Mr. Wear, they had two shifts working there at the pole yard not long ago, didn't they? A. They did.

(Testimony of Con Wear.)

Q. How long had those two shifts worked?

A. I couldn't tell how long for sure.

Q. When did they put on the second shift?

A. I don't know whether it was April or May. I could not say for sure when they started two shifts.

Q. Your best recollection is that it was probably April or May?

A. I think that is about when it was. I couldn't say for sure.

Q. When did they take off the second shift?

A. About a month ago.

Q. And you were in charge of one of those shifts? A. Part of the time.

Q. What time did the shifts run?

A. From four thirty to twelve.

Q. That was the second shift?

A. That was the first shift.

Q. From 4:30 in the afternoon?

A. In the morning.

Q. Oh, 4:30 a.m. until 12 noon?

A. That is right.

Q. And the second shift ran from 12 noon until what time? A. Until 7. [130]

Q. During what part of the time were you in charge?

A. When Mr. Conlee left his orders. As soon as he got there he gave us our orders what to do.

Q. Did you go to work at 4:30 in the morning?

A. I did.

(Testimony of Con Wear.)

Q. What time did Mr. Conlee get to work?

A. I couldn't say every morning what time he got there.

Q. As a general rule about what time?

A. 7 or 8 o'clock.

Q. You were in charge until he got there?

A. Sometimes Mr. Conlee was there earlier in the morning.

Q. On those occasions he was not there you were in charge until he got there, were you not?

A. That is right.

Q. What time did you quit work when you came to work at 4:30 a.m.?

A. At 12 o'clock.

Q. Quit at 12 o'clock?

A. I did.

Q. And Mr. Conlee then was in charge of the shift until 7 that night.

A. I don't know what time he left there. I was not there to see him go.

Q. On previous occasions, that is, prior to the time they put on this second shift, you have taken the place of [131] Mr. Conlee, have you not, as the boss of the men there.

A. I have, but it has been not very many times that I have.

Q. And you at all times for the past couple of years have gone about over the yard and have given orders, have you not?

A. At all times, you say?

Q. During the past two years?

(Testimony of Con Wear.)

A. I have not given orders. I have been given orders to take to the inspectors on paper that Mr. Conlee wanted carried out.

Q. And you have given orders by word of mouth, have you not, oral orders to the men?

A. Not very often.

Q. But you have? A. I have.

Q. And you have told men where to work, have you not? A. Where to work?

Q. Yes.

A. I have when Mr. Conlee was not there.

Q. And you have carried out orders that Mr. Conlee gave you and passed them on to the workmen, have you not? A. I have.

Q. You have hired men, haven't you?

A. Not since Mr. Conlee has been on the job.

[132]

Q. By the way, you were in charge of the yard, were you not, for a while prior to Mr. Conlee coming? A. I was.

Q. When did Mr. Conlee come?

A. I don't remember whether it was 1939 or——

Q. It was about two years ago? A. Yes.

Q. For how long before Mr. Conlee got there were you in complete charge of the yard?

A. Not very long. I don't remember whether it was August to November or whether it was July to November. I couldn't say for sure.

Q. It was around four or five months probably?

(Testimony of Con Wear.)

A. Yes.

Q. Then after Mr. Conlee came, when there was only one shift, you assisted him, did you not?

A. No, not all the time. I have loaded poles, and I could not assist Mr. Conlee in his work if I was running machinery.

Q. On those occasions when you were not running machinery you were assisting him?

A. Not always.

Q. About half the time?

A. No, I would not say half the time.

Q. About what percentage of the time?

A. I would not like to say. [133]

Q. As much as a third of the time?

A. I haven't got anything to say about the system or how to do anything.

Q. Well, you have given orders to men as to where they would work and with whom they would work since Mr. Conlee has been there, have you not?

A. Yes.

Q. And isn't it a fact that you hired Joe Crane?

A. No, Mr. Conlee asked me if I would ask Joe Crane to come to work, the same as he has all his help.

Q. Did Mr. Conlee ask you to get somebody for him and you picked out Joe Crane?

A. No, I wouldn't say that.

Q. You mean then Mr. Conlee told you to hire Joe Crane?

(Testimony of Con Wear.)

A. Mr. Conlee has hired every man on the job since I have been there.

Q. Did Mr. Conlee tell you to hire Joe Crane?

A. He told me to ask him to come to work.

Q. Was this February 15 meeting your idea?

A. No, it was not my idea.

Q. I beg your pardon?

A. It wasn't my idea alone.

Q. It was yours and whose else?

A. George Cronkright and Ed Gillespie.

Q. Did you mention it to Cronkright first, or did he [134] mention it to you?

A. I don't know whether it was George Cronkright who mentioned it first, or whether it was I.

Q. You did not start talking about this meeting until you heard there was some talk among the employees of joining a union, did you?

A. I never heard of any talk among the employees about the union.

Q. Did you hear there was some talk among the employees about a union and that some union organizers had been in town?

A. There had been union organizers in town.

Q. And it was after you heard that that you started this talk about the February 15 meeting?

A. That I started the talk?

Q. Put it this way, it was after you heard the union organizer was in town that you and George Cronkright started talking about the meeting?

(Testimony of Con Wear.)

A. That is right.

Q. Now, you introduced Mr. Conlee, did you not, at this meeting at the Peterson Hotel on February 15th and stated that Mr. Conlee had had experience with the union?

A. I think I asked if Mr. Conlee could tell us something about the union. [135]

Q. Didn't you state at that time that Mr. Conlee had had experience with the union?

A. I don't remember that, how I stated that he had.

Q. Well, you knew, did you not, Mr. Wear, that Mr. Conlee had had experience with the union?

A. Yes.

Q. And how did you know that?

A. Well, we got machinery from Minneapolis and it was marked up with CIO and different organization marks, and just by that he must have had experience with it. That is where the machinery came from.

Q. You knew Mr. Conlee had come from Minneapolis? A. I did.

Q. Did he come here from the Schaefer-Hitchcock Company plant in Minneapolis?

A. I don't know whether he worked for the Schaefer-Hitchcock Company plant or who he worked for.

Q. You had talked to Mr. Conlee, had you not, prior to this February 15 meeting about his experience with the union back there?

(Testimony of Con Wear.)

A. I had not.

Q. You mean before you had this meeting in the hotel you had never talked with Mr. Conlee about the union?

A. I don't believe I ever had.

Q. Isn't it true, Mr. Wear, that you knew how Mr. Conlee [136] felt about the union before you introduced him? A. No, I did not.

Q. You are sure you did not know it at the time you introduced him? A. I did not.

Q. Did you not sign an affidavit, Mr. Wear, before an agent of the National Labor Relations Board by the name of Smiley? A. I did.

Q. And you read that affidavit before you signed it, didn't you? A. Yes.

Q. You swore to it? A. Yes.

Q. Now, isn't it true that you stated in that affidavit that you introduced Mr. Pat Conlee as a man who had had experience with the union in the East?

Mr. Potts: Objected to unless the witness is shown the affidavit.

Trial Examiner McNally: He may answer.

A. I don't remember how I introduced Mr. Conlee at the meeting, and how it was worded, for sure.

Q. Is it your testimony now—I want to be sure that I understand you—is it your testimony that at the time you introduced Mr. Conlee at that meeting you did not know [137] how he felt about the

(Testimony of Con Wear.)

union?

A. I don't know to this day how Mr. Conlee feels toward the union.

Q. Well, you heard him make his statement about how he felt towards the expense of the union and about the strike?

A. He said he did not know whether they benefited by it or not.

Q. You had heard that before from Mr. Conlee, before that day, had you not?

A. Before that day? Before we had our meeting?

Q. That is right.

A. I don't believe Mr. Conlee and I ever talked about a union before that day.

Q. Is it your testimony then that because you had seen some machinery from Minneapolis that had Labor Union stickers on it that is the reason you thought Mr. Conlee had had experience with unions?

A. Yes, sir.

Q. That is the only reason you had for believing it?

A. He has never talked about unions and never told any of us about the union.

Q. Is that the only reason you had for believing Mr. Conlee had had experience with the union in the East?

A. That is right.

Q. Do you recall stating in that affidavit in August, [138] 1941: "My present capacity is that of straw boss."

(Testimony of Con Wear.)

A. I believe that was when we were running two shifts.

Q. Yes; you did state that in your affidavit?

A. That is right.

Q. And that was true?

A. When we were running two shifts.

Q. Do you remember when Mr. Damschen was dismissed from the employ of the company?

A. Yes.

Q. There were some new tractor drivers hired after that, were there not? A. Yes.

Q. And who were the new tractor drivers hired after Damschen's dismissal?

A. Roy Dempsey.

Q. Anybody else?

A. There was one man hired along while afterwards on the Ford tractor.

Q. Do you remember his name?

A. I don't remember who the first man was.

Q. Can you tell us who the tractor drivers were when you had two shifts this year?

A. Orville Gillespie and Sam Dalebout.

Trial Examiner McNally: How is that?

Mr. Schaefer: D-a-l-e-b-o-u-t (spells it). [139] I am not sure whether that is correct or not.

Trial Examiner McNally: Can anybody, any of you gentlemen give the correct spelling?

Mr. Schaefer: There is no "a" after the "e". It is Dalebout (spells it).

(Testimony of Con Wear.)

Q. (By Mr. Brooks) That is Roy Dempsey, Orville Gillespie, and Sam Dalebout. Anyone else that you can tell about?

A. And Fay Dempsey.

Trial Examiner McNally: Is that the same Dempsey that has been referred to throughout, or is there another Ray Dempsey?

Mr. Brooks: No, Fay is the man who has been referred to as tractor driver.

Q. (By Mr. Brooks) Was Clyde Wear on there when the two shifts were on? A. No.

Q. You had six, did you not, altogether, when there were two shifts? A. Yes.

Q. You have named four. Can you name the other two?

A. Who have I named? Roy Dempsey and Fay Dempsey?

Q. And Gillespie and Dalebout.

A. Gillespie and Dalebout and Cleo Thomas and Ed Dalebout.

Q. Was this Orville Gillespie that you named the one who [140] talked with you and Cronkright about this meeting of February 15? A. No.

Q. That is a different Gillespie?

A. Ed Gillespie was the one who talked with us.

Q. Is he Ed Gillespie's brother?

A. Orville Gillespie's father.

Mr. Brooks: I see. That is all.

(Testimony of Con Wear.)

Redirect Examination

Q. (By Mr. Potts) Now, let's find out about who gave the orders around this plant. When you gave any orders to any man, if you did, were they your orders or the orders of the foreman?

A. They were the orders of the foreman.

Q. And where did you get your instructions and orders? A. Mr. Conlee gave them to me.

Q. Did you have at any time any right to hire or fire men at the plant? A. I did not.

Q. And did you ever do it? A. I did not.

Q. Did you have the right or were you called upon to recommend hiring or firing of men?

A. No, sir.

Q. When you described yourself as a straw boss in the [141] summer of 1941, what were you doing during that period? That is to say, was that the time that the double shift was on?

A. That was when the double shift was on.

Q. When, during a few hours of the day you were highest man in authority in the plant, were you? A. Until Mr. Conlee arrived there.

Q. Until he arrived there. And that was during what period or time of day?

A. From 4:30 until 7 or 8 o'clock.

Q. From 4:30 in the morning until 7 or 8 o'clock in the morning? A. In the morning, yes.

Q. And what was the situation as to whether the work was lined out for those early morning hours before the men came to work?

(Testimony of Con Wear.)

A. Mr. Conlee left his orders in the afternoon on his desk, what he wanted done, on a paper.

Mr. Potts: That is all.

Examination

Q. (Trial Examiner McNally) Mr. Wear, when you were not acting as straw boss will you tell us just what you did and how you did it?

A. Well, I ran a Michigan loader.

Q. How is that operated? [142]

A. Gas and air.

Q. What does it do? How does it work?

A. It has a boom on it and a line on the boom, and we hook the poles on the line and put them on the cars.

Q. Are there any men other than yourself required in that operation?

A. To make this machine work, you mean?

Q. Well, when the machine is being used?

A. Yes.

Q. How many men?

A. One man that hooks on the ground and two men on the car.

Q. Well, who supervises those three men?

A. The foreman.

Q. Who is the foreman? A. Mr. Conlee.

Q. Is he in and around the yard at all times?

A. At all times.

Q. You do not issue any orders to the three men or tell them just what you want done?

(Testimony of Con Wear.)

A. No, Mr. Conlee tells them how to stake their cars and what he want branded. That is about all there is to it.

Q. You have no occasion to speak to those men at all with reference to the work?

A. Not at all. [143]

Q. You have nothing to say to them at all?

A. How to do their work.

Q. What, if anything, do you say to them about their work while you are operating this loader?

A. Nothing. They tell me what to do.

Q. All right. When you operate the jammers how many men are involved in that?

A. Well, there are two men on the car and one man to hook them if they are hooking dry poles.

Q. Now, do you have anything to do with those men in the way of giving them instructions while you are operating the jammer? A. No.

Q. You don't have anything to say to them at all?

A. No, no more than a conversation when we talk among yourselves.

Q. How do they know what to do?

A. They get their orders from Mr. Conlee, what to do.

Q. When you inspect poles, how is that operation carried on?

A. By measurement to get the different classes and grades.

(Testimony of Con Wear.)

Q. Where are they when you measure them?

A. On a deck.

Q. In a pile? A. Yes. [144]

Q. Is there any other man working with you when you are inspecting?

A. Sometimes and sometimes there is not.

Q. Tell us about when there are other men there?

A. There is one man on each end to measure the ends and see what size they are and to classify them.

Q. Well, what do you do? Just keep the tally or just grade them or just how is it worked?

A. We measure the pole, and whatever size it is we put the class on, what size it is.

Q. Do you measure the poles or do the other employees measure them?

A. No, I measure them.

Q. Is there any other employee working with you when you are inspecting?

A. There is a helper.

Q. What does he do?

A. He measures an end too.

Q. Do you have any occasion to tell him what to do or what you want him to do?

A. Not unless he,—he tells you the measurement and if you don't hear it you ask him for it again.

(Testimony of Con Wear.)

Q. Where does he get his instruction?

A. When he goes to work from the foremen.

Q. Now, in operating either of the jammers or the loader or [145] in the inspecting of the poles how do these men happen to work with you? Who tells them to work with you? A. Mr. Conlee.

Q. How does he do it?

A. He asks them if they will go with me to get an order out.

Q. Does he ever tell you to get the men and do the work?

A. Oh, he may once in a while but most always he tells who to get and where to go.

Q. Well, is there anybody out there at the pole yard besides Mr. Conlee who is a foreman or supervisor? A. There is not.

Q. He is the only one? A. Yes.

Q. And he is in full charge of the operations?

A. He is.

Q. Well, who is next in authority, if anybody?

A. Well, I don't know as there is anybody.

Q. Do I understand you to say when Mr. Conlee is away you take his place? A. I have.

Trial Examiner McNally: Anything further?

Mr. Brooks: Yes.

Trial Examiner McNally: Did you have some more?

Mr. Potts: Just a question or two. [146]

(Testimony of Con Wear.)

Redirect Examination

Q. (By Mr. Potts) In the operation of the loaders and the jammers are they operated by a crew of men each one of whom has certain work to do? A. That is right.

Recross Examination

Q. (By Mr. Brooks) Does the loader work all the time? Is it in operation all the time at the yard when you are loading poles?

A. When we are loading?

Q. Yes.

A. Is the loader in operation all the time?

Q. Is the loader in operation at all times when poles are being loaded? A. Yes.

Q. What I am driving at, Mr. Wear, does the loader just operate on rare occasions or does it work pretty steadily?

A. We load all the untreated poles with the loader.

Q. So that it works every day?

A. Whenever we have orders to load.

Q. That is not your regular job, to operate that Michigan loader, is it?

A. I don't know what my regular job would be there.

Q. There are other men who operate that Michigan loader, aren't there? [147]

A. Not very many.

(Testimony of Con Wear.)

Q. How many men operate it from time to time?

A. Two or three, I guess.

Q. Don't you have some men who are regularly assigned to operate that Michigan loader?

A. Now?

Q. Yes.

A. Yes, it is up at Sandpoint in the woods.

Q. Before it left, when it was working out here, did you have men regularly assigned to it?

A. Yes.

Q. And you merely filled in, did you not, when you worked the loader? A. That is right.

Q. The jammer does not work all the time, does it? A. Not all the time.

Q. And were there other men regularly assigned to work the jammer? A. No.

Q. You were the only one who ever worked it?

A. No, I am not the only one who ever worked it.

Q. Well, how did you work that? Did you work it sometimes and sometimes somebody else work it?

A. Yes, sir.

Q. It was dependent on how much work was going on [148] in other parts of the yard, wasn't it?

A. No, if someone wasn't there I filled in for him.

Q. Can you tell me, Mr. Wear, the approximate size of the pole yard, the area it covers?

A. No, I can't.

(Testimony of Con Wear.)

Q. 25 acres?

A. I don't know the dimension exactly.

Q. Can you tell me about how many yards long it is? A. No.

Trial Examiner McNally: Can that be furnished by anyone else? Can you tell me, Mr. Schaefer?

Mr. Schaefer: About 17 acres including the upper yard, the west yard.

Trial Examiner McNally: What is referred to as the upper yard?

The Witness: They call it the upper yard because it is elevated about ten feet. The ground is 10 or 12 feet higher. One is called the west and the other the east yard.

Mr. Brooks: I wonder if we could find out about it, Mr. Examiner, while we are on the subject, the width and length, if Mr. Schaefer has that.

Trial Examiner McNally: Can you approximate it?

Mr. Brooks: Maybe Mr. Conlee knows it.

Mr. Conlee: I haven't any figures on it. [149]

Mr. Schaefer: It is irregular, and it is hard to figure out unless you survey it.

Q. (By Mr. Brooks) Where is Mr. Conlee's office located in the yard as to one end or the other or the middle, running lengthwise?

A. I would say it was pretty close to the center of the yard or the middle of the yard.

Q. And Mr. Conlee keeps his records there in that office, does he not? A. That is right.

(Testimony of Con Wear.)

Q. And handles all orders there in the office, does he not? A. Yes.

Q. Is there any other office employee working in that office regularly? A. No.

Q. Well, isn't it true, Mr. Wear, that many times you are asked by Mr. Conlee to tell the men to do a certain thing and then you go to the men and pass on the orders of Mr. Conlee?

A. I have, and also helped them do it.

Q. Yes, and worked along with them?

A. Yes.

Q. But on those occasions you are the one immediately in charge of the work, are you not, subject, of course, to the direction of Mr. Conlee above you?

[150]

A. He is most always there to see that we do it the way he wants it.

Q. But there are occasions when he is not there, isn't that true? A. Perhaps.

Mr. Brooks: I think that is all.

Mr. Potts: That is all.

Trial Examiner McNally: You may be excused.

(Witness excused)

CHARLES E. LEOBOLD,

a witness called by and on behalf of the Respondent Schaefer-Hitchcock Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (Mr. Potts) Your full name, Mr. Leobold?

A. Charles E. Leobold.

Q. Your residence? A. Priest River.

Q. How long have you lived in Priest River?

A. 22 years.

Q. Are you employed at the cedar pole plant of the Schaefer-Hitchcock Company in Priest River?

A. I am.

Q. How long have you been employed there?

A. About three and a half years. [151]

Q. In what capacity?

A. Well, I was just general laborer.

Q. What does that labor include specifically in the pole yard operation?

A. Well, it would be tailing down poles and decking and skidding poles. Usually I am,—most of the time since I have been down there I have been working on the skidway where they peel the poles and get them ready for the perforating machine.

Q. In this pole yard there are a number of skidways on which the poles are skidded or decked in piles? A. Yes.

Q. And then there are skidways that lead to certain types of preparation of the poles?

(Testimony of Charles E. Leobold.)

A. Yes.

Q. And on one of them is where you have been working? A. Yes, that is where I work.

Q. What were you doing last February and March?

A. We were getting out poles. I was probably peeling poles, that is, peeling butts and getting them ready for perforation.

Q. Were you working in the pole yard at Priest River during the months of February and March, 1941,—throughout those months?

A. I was, yes, sir. [152]

Q. Did you attend a meeting of the employees working there in the pole yard on February 15, 1941? A. Yes, sir.

Q. When did you first hear of that meeting?

A. Oh, about ten o'clock Saturday morning.

Q. Who did you hear about it from?

A. I could not say whether it was one of the boys working there at the skidway who asked me or who did ask me. I wouldn't know.

Q. You learned there was to be a meeting?

A. Yes, I learned there was to be a meeting, and if I remember right, whoever told me, I said "I don't know whether I will be there or not. I am not very much interested."

Q. You did attend, however?

A. I did attend, yes.

Q. Up to that time had you heard anything about

(Testimony of Charles E. Leobold.)

organization work or a union or any union activities around about the yard?

A. Not about the yard, no.

Q. Had you heard or did you know from any source that there had been some union organizer who came into Priest River territory?

A. Yes, I did.

Q. But you had not seen any evidence of union activity [153] in the yard?

A. Well, outside of I think I saw a union paper of some sort in the boiler room. I don't know how it got there or where it came from or anything else, but that is all.

Mr. Potts: That is all. Oh, yes, I have a little more.

Q. (By Mr. Potts) You hadn't seen any person who you knew belonged to a union?

A. Not that I knew belonged to any union or was an organizer, no.

Q. When you arrived at the meeting, had the crowd gathered or at about what stage of the proceedings did you arrive?

A. Well, I think the meeting was to be at two o'clock or thereabouts, and I got there just about that time, and practically all the yard crew were there at that time, when I got there.

Q. Now, about that hour, do you think it was two o'clock or some other hour?

A. No, it was about two o'clock or two-thirty.

(Testimony of Charles E. Leobold.)

Q. That was Saturday afternoon?

A. Saturday afternoon.

Q. And the crew was off? A. Yes.

Q. What did you first hear at the meeting?

A. Well, about the first thing that was said to me was,—Mr. Cronkright and I and several others were kind of in a [154] bunch by ourselves. I don't remember just what we were talking about, but he said to me, "Won't you act as Chairman?" And I said, "No, I will not. I am one of the youngest members of the crew in the yard, and I think it would be much better if we had a chairman, for you to act as one." So that is about the first conversation we had at that time.

Q. Well, did you have a chairman?

A. No, there was no chairman.

Q. The meeting was never organized as a formal meeting? A. No, sir, it was not.

Q. I just want your recollection as to how it proceeded. What occurred generally without going into detail too much? Did you hear a conversation or remarks in which all participated, particularly with reference to the matter of organizing a union or anything connected with a union?

A. Yes, I think, if I remember rightly, Mr. Cronkright got up and told what the meeting was for, that we were there to either organize or not organize; that it was not necessary to organize but we were there more or less to get the opinion of

(Testimony of Charles E. Leobold.)

the crew as to becoming affiliated with the union or having a union of our own, or something to that effect. And I don't remember just who was the next person who spoke, but I think Mr. Wear had a few words to say, but what they were, I can't recall that either.

Q. Do you recall hearing Mr. Conlee say anything? [155]

A. Mr. Conlee was called upon by somebody—I don't know who. I would not say as to that—to tell just what he— Well, not what he knew about the union but what experience he had had with the unions or something to that effect, and I remember him stating first that the company was in favor of a union if the men wanted one; that they were not objecting to any organization as a member of the union, and then Mr. Conlee, I remember, stated that he had had some experience in connection with,—not that he had any experience, but the experience they had had in one of the yards—where it was I would not say—but that the men had been out some six or eight or ten weeks, something like that, and they had not gained the point by striking. Now, that is the sum and substance of his conversation, as I remember it.

Q. Did you hear Mr. Conlee make any remarks derogatory to the union or the union movement by labor?

A. No, sir, I did not.

Q. Or say anything in opposition to organization?

A. No.

(Testimony of Charles E. Leobold.)

Q. Or to the employees joining the union?

A. No.

Q. Did you get the impression he was antagonistic to the unions? A. No, sir. [156]

Q. Had you had any prejudices one way or the other before you attended the meeting, or rather, any premonition rather than prejudice in favor of or opposed to the labor union——

Mr. Brooks: I object to that as immaterial.

Mr. Potts: It is laying the foundation.

Trial Examiner McNally: He may answer.

Q. (By Mr. Potts) You had? A. Yes, sir.

Q. Were you affected in any way by anything that occurred at that meeting as to your future action? A. No, sir.

Q. By the way, after the discussion about the union, was any action taken of any kind?

A. None, sir.

Q. And the subject was dropped, was it?

A. Well, as the testimony of some of the other men discloses, I can verify as to Mr. Damschen—finally they were willing to vote on it. I think somebody suggested—I think Mr. Gillespie, but I am not certain—taking a vote on it, and Mr. Damschen objected to that. He said, that he hardly thought it was fair for us to vote on it without a representative of the union to argue for the union.

Q. And as a result of his objection, what happened? A. There was no vote taken. [157]

(Testimony of Charles E. Leobold.)

Q. And was anything further discussed than as far as the union matter was concerned?

A. No. There was one or two other boys who got up and said a few words, but I don't just recall what they were.

Q. And the meeting turned itself into a party?

A. Yes, sir.

Q. And did you participate in that?

A. I did, sir.

Q. Did you buy a case of beer?

A. I bought two cases of beer.

Q. You bought two cases? A. Yes.

Q. Did you pay for them yourself?

A. Yes, sir, by check.

Q. With your own money?

A. Yes, sir, my own personal check.

Q. Did others participate in the drinking of those two cases, or did you drink it all yourself?

A. No, sir, there were 22 of us there.

Q. Now, after that meeting during the rest of the month of February and up through March, did you continue to work in the pole yard?

A. Yes, sir.

Q. Were you there every working day?

A. Yes, sir. [158]

Q. Did you observe any union activity in or about the yard during that period? A. No, sir.

Q. Did you observe any activity on the part of Mr. Damschen— A. No, sir.

(Testimony of Charles E. Leobold.)

Q. —in any way? A. No, sir.

Q. Did you know whether or not he was a member of the union?

A. No, sir, I had no way of knowing.

Mr. Potts: That is all.

Cross Examination

Q. (By Mr. Brooks) What is your rate of pay?

A. 65 cents an hour.

Q. When was it raised from 60 to 65?

A. I would say probably the first of April or May.

Mr. Brooks: That is all.

Mr. Potts: That is all.

Trial Examiner McNally: You may be excused.

(Witness excused)

R. E. McKEE,

a witness called by and on behalf of the Respondent Schaefer-Hitchcock Company, being first duly sworn, was examined and testified as follows: [159]

Direct Examination

Q. (By Mr. Potts) Your full name, please.

A. Ruben E. McKee.

Q. Residence? A. Priest River.

Q. How long have you lived in and about Priest River? A. Since August of 1925.

(Testimony of R. E. McKee.)

Q. Are you employed by the Schaefer-Hitchcock Company at the pole yard in Priest River?

A. I am.

Q. How long have you been employed there?

A. Well, ever since it has been the Schaefer-Hitchcock Company, and then I worked for the Kaniksu Cedar before from 1927.

Q. What is your job in the pole yard?

A. I run a steam hoist.

Q. What does the steam hoist do? What function does it perform?

A. As the poles are treated or punctured or perforated—whatever you call it, and rolled down I pick them up with the boom and swing them over and put them in the vat and they are treated and taken out and from there put on the loader.

Q. Were you doing that type of work the last couple of weeks in March? [160]

A. I was.

Q. Were you at the pole yard during those months regularly on working days?

A. February and March?

Q. Yes. A. Yes.

Q. Did you attend this meeting of the employees at the Peterson Hotel in Priest River on February 15, 1941?

A. I did.

Q. When did you first hear about that meeting?

A. Oh, it was around about 10:30 or 11 o'clock, maybe 12. I could not say for sure.

Q. On that same day?

(Testimony of R. E. McKee.)

A. On that Saturday.

Q. From whom did you hear about it?

A. Well, I could not say whether it was George Cronkright or Con Wear or Sam Lynn; but anyway, I heard there was going to be a meeting.

Q. And it did not impress itself on you as to just who told you? A. No.

Q. Well, had you seen any evidence of union or organization activity around the yard before that date? A. No, sir.

Q. Had you heard there was a union organizer in the yard? [161] A. Yes, sir.

Q. And did you know that the purpose or at least one of the purposes of the meeting was to discuss the question of unions? A. Yes, sir.

Q. What is your recollection of what occurred at that meeting briefly?

A. Well, we went up there to the Peterson Hotel and gathered in there, and when they got around to it somebody made the suggestion that if we were going to do anything one way or the other, we should find out what we were going to do and better get started. So somebody asked questions and this and that and there was a conversation.

Q. Did you hear Mr. Pat Conlee the foreman make any remarks there?

A. Yes, he was asked about his experience.

Q. You heard him make some remarks?

A. Yes.

(Testimony of R. E. McKee.)

Q. Did someone ask him some questions?

A. Yes, somebody did ask him if he would state his,—well, what the attitude with the union or his experience of any kind with the union had been.

Q. Now, have you a fairly distinct recollection of what he said there?

A. Well, only that he made it very strong that the company [162] was not opposed to the union or that it made no difference,—he did not tell anybody not to belong to it or to it, or anything about it.

Q. From what you heard him say, did it have any influence on your views on the union question?

A. No, sir.

Mr. Brooks: I move to strike the answer and interpose an objection to the question that this line of inquiry is immaterial and I object to the question for that reason.

Trial Examiner McNally: The objection is well taken in my opinion.

Q. (By Mr. Potts) Did you remain at the meeting for some time after they quit talking about unions——

A. Yes.

Q. —and anything in connection with them?

A. Yes.

Q. You stayed for the party? A. Yes.

Q. Now, after the meeting was over and during the rest of the month of February and March, did you observe any union activity around the plant of any kind? A. No, sir.

(Testimony of R. E. McKee.)

Q. Did you see Mr. Damschen from time to time around there? A. Yes. [163]

Q. Did you observe any activity on his part in connection with the union or organization of a union? A. No, sir.

Q. Did you know that he was a member of a union? A. I did not.

Mr. Potts: You may cross examine.

Cross Examination

Q. (By Mr. Brooks) What is your rate of pay?

A. What?

Q. What is your rate of pay?

A. 75 cents an hour.

Q. You operate this hoist? That is the only job you do,—operate this hoist?

A. Oh, I do other things if it is not running, but when it is running steady that is what I do. That is my regular job.

Q. That is your regular job? A. Yes.

Mr. Brooks: That is all.

Mr. Potts: That is all.

Trial Examiner McNally: You may be excused.

(Witness excused)

PATRICK J. CONLEE

a witness called by and on behalf of the Respondent Schaefer-Hitchcock Company, being first duly sworn, was [164] examined and testified as follows:

Direct Examination

Q. (By Mr. Potts) What is your full name, Mr. Conlee? A. Patrick J. Conlee.

Q. And you reside in Priest River?

A. Priest River.

Q. And you are the foreman at the pole yard of the Schaefer-Hitchcock Company in Priest River?

A. Yes, sir.

Q. How long have you had that position?

A. Since November, 1939.

Q. As foreman of the poleyard what are your duties generally speaking?

A. Well, to take care of the orders, to see that they are filled and shipped out and when the poles come in to see that they are properly put away and decked. I have full supervision of the men doing that work.

Q. Is there anyone else at the pole yard who is in charge of any of its operation other than you?

A. No, sir.

Q. Have you any assistant foremen?

A. No, sir.

Q. Or any supervisory officials under you?

A. No, sir.

Q. In performing your duties do you occasionally pass [165] orders on through someone else?

(Testimony of Patrick J. Conlee.)

A. I do.

Q. What has been the status of Con Wear in the pole yard since you have been there in regard to having any authority in connection with its operation.

A. Well, I have considered Mr. Wear as a kind of a general utility employee whom I put wherever I need him. That is, there are times I might have something to do down at one end of the yard, and I might ask Con to transmit to the inspector down there or the man handling the poles from that end of the yard my orders telling them what to do.

Q. Does he work during regular hours at some job or other in the pole yard?

A. Some job or other, yes. He has no definite assignment.

Q. That is, he goes from one job to another that he is capable of performing——

A. Yes.

Q. —on your orders?

A. Yes, sir.

Q. Has he any authority to hire or fire men?

A. No, sir.

Q. Or to recommend the hiring or firing of men?

A. Well, he may recommend, and when I first came in here I was not familiar with the men and sometimes I might ask Con whether this man was a good man or that one was. [166]

Q. When you came here had you come from another operation of the Schaefer-Hitchcock Company?

(Testimony of Patrick J. Conlee.)

A. Well, the operation I came from was the Consolidated Company. Previous to that I was operating a yard for the Schaefer-Hitchcock Company.

Q. Mr. Conlee, it is in evidence that you attended a meeting of the employees held in Priest River on February 15, 1941. How did you happen to attend that meeting?

A. Well, I was invited by Mr. Cronkright and I think Mr. Wear and Mr. Ed Gillespie, who was there at the time. They invited me to attend this meeting.

Q. Did you have anything to do with the calling or holding of that meeting? A. No, sir.

Q. Did you know it was to be called or held until you were told or invited to come by those gentlemen?

A. No, sir, that was my first intimation of it.

Q. And when was that intimation or invitation given to you?

A. Well, it was just about noon or just before quitting time; not more than an hour before quitting time.

Q. At noon on Saturday? A. Yes.

Q. Oh, was the plant operating Saturday mornings? A. Yes.

Q. Your operations there in the pole yard in February [1941] and March were on what basis as to days? A. A forty hour week.

Q. How was the forty hour week distributed as to days?

(Testimony of Patrick J. Conlee.)

A. Five seven hour days and five hours on Saturday.

Q. So that it was at the plant an hour or so before closing time at noon that this occurred?

A. Yes.

Q. What was your response to them? What did you say?

A. Well, I kind of hesitated. I said I did not think I ought to attend the meeting. They kind of urged me and said it would be a good thing if I went up there, that they would like to have me.

Q. So you went? A. So I went, yes.

Q. After you got there what is your version of what transpired at that meeting?

A. Well, it is a good deal as has been testified here. The boys congregated there and there was more or less pro and con talk, some talking about the unions and some talking about something else, and I don't recall very well who did the talking or what was said particularly.

Q. Well, at some stage of the meeting did you make some remarks?

A. I did after the meeting was about to end. I think that I was asked to make some remarks, yes.

[168]

Q. How did that come up?

A. Well, I think someone asked if I would say something in regard to unionism as it was back in Minneapolis.

Q. And what did you say?

(Testimony of Patrick J. Conlee.)

A. Well, I recall stating that,—the first thing I said was that the company had no objection to whether men organized or did not organize; and then I believe I stated that from what I had seen of union in Minneapolis I did not think they had benefited from the union due to the fact that they had been on strike for sometime.

Q. What did you refer to in that connection?

A. Well, I had in mind a strike had occurred in the cedar pole yards in Minneapolis.

Q. While you were there? A. Yes.

Q. Before you came out here? A. Yes, sir.

Q. Do you recall anything further that makes any impression on your mind as to what you said?

A. No, I can't recall anything further.

Q. Now, did you advise or say anything to the effect that the employees could get no benefit or no benefit would be derived by the employees membership in a labor union?

Mr. Brooks: I object to the question as calling for a [169] conclusion of the witness. Let him state what he said. Whether or not a certain conclusion could be or would normally be drawn from that is a conclusion for the Examiner and the Board.

Trial Examiner McNally: I understand counsel is asking the witness for what he said.

Mr. Potts: Yes.

Mr. Brooks: No.

Trial Examiner McNally: Read the question.

(Question read)

(Testimony of Patrick J. Conlee.)

Mr. Brooks: Withdraw the objection.

Trial Examiner McNally: Very well.

A. No.

Q. (By Mr. Potts) Did you state at that meeting that the employees of the Schaefer-Hitchcock Company should not join the union?

A. No, sir.

Q. Did you make any statement in words or substance that the Schaefer-Hitchcock Company would close its plant or curtail operation if the employees joined or were involved in the union?

A. No, sir.

Q. Did you make any statement at that meeting that you believe to be derogatory of labor unions?

A. I don't think so. [170]

Trial Examiner McNally: Well, did you say anything about unions that was critical?

The Witness: I don't recall that I said anything of unions. I merely expressed myself as to what had happened and what I had seen happen of men going on strike and staying out for a considerable time and not gaining anything by it.

Q. (By Mr. Potts) Mr. Conlee, since you have been here in charge of this Priest River pole yard of the Schaefer-Hitchcock Company, have you ever taken any position antagonistic to labor unions?

A. No, sir.

Q. Or have you opposed the organization of that plant by labor unions?

A. No, sir.

Q. Have you ever received any instructions from

(Testimony of Patrick J. Conlee.)

your superiors in the company to oppose labor unions? A. No, sir.

Q. Do you know what the general attitude of the company and its officers is toward labor unions?

A. I think I do.

Q. Is it antagonistic or not? A. No, sir.

Q. By the way, did you hear Mr. Damschen make any statement or remarks at that meeting? Do you recall anything in [171] particular that he said at that meeting,—Mr. Damschen, I am referring to?

A. Well, I do recall Clifford said something about being dissatisfied and having a grievance about something. I asked him why he didn't come to the office, and he said that he understood if a man would go to the office, he might get fired. I said, "Those conditions don't exist. Any time any man has got a grievance I am only too glad to see him." I think also Clifford said something about that there should be a labor man there to talk about the labor side of the question.

Q. Now, did anything that he said make any lasting impression on your mind?

A. I don't recall that it did, no.

Q. Did it cause you to have any feeling of antipathy toward him?

A. None whatever.

Q. Did you lay off or discharge Mr. Damschen on March 19, 1941? A. Yes, sir.

Q. That was how long after this meeting of February 15, 1941?

(Testimony of Patrick J. Conlee.)

A. Something over a month.

Q. During that period of over a month had you seen any evidence of activity by Mr. Damschen in favor of organizing [172] that pole yard?

A. No, sir.

Q. Had you seen any evidence of union activity on his part? A. No, sir.

Q. Did you have any knowledge that he had become a member of any labor union?

A. No, sir.

Q. Did you have any conversation that led you to believe that he was pursuing any course of conduct whatever toward the organization of a union at the plant? A. I did not.

Q. And as a matter of fact, had anything been done toward organizing a union at that plant during that period that you know of?

A. As far as I know of, nothing.

Q. Why did you discharge Mr. Damschen from the employment of the company on March 19, 1941?

A. Well, we laid off one tractor. We were about to lay off one tractor, and Mr. Damschen was chosen as the man to go.

Q. You decided to lay him off instead of others?

A. Yes, sir.

Q. Was your decision to lay him off influenced by reason of any union activity on his part?

A. No, sir, I did not know that he was active.

[173]

Q. Was it influenced by anything that occurred at this meeting on February 15, 1941?

(Testimony of Patrick J. Conlee.)

A. No, sir.

Q. Did you lay him off or discharge him because of union activity?

A. No, sir.

Q. Or because of his membership in a union?

A. No, sir.

Q. Now, we have heard some talk about tractors here. What are these implements or machines that we call tractors that are operated out in this pole yard?

A. Well, a tractor is a general name for them.

Q. What size tractors are they?

A. They are gasoline operated machines.

Q. What size are they?

A. Well, I think the ones we have down there are,—I could not say, but I think probably three or four ton.

Q. Well, using relative terms, are they small, medium or large?

A. Well, I would say they are medium; two medium and one small.

Q. Now, where are they operated?

A. They are operated around the yard in handling poles.

Q. And on what kind of road bed?

A. Well, they handle long trams, wooden trams, and also [174] dirt.

Q. In handling poles how do they handle them? Skid them?

A. Skid them behind; hook them on a chain and drag the poles behind.

(Testimony of Patrick J. Conlee.)

Q. Is that very difficult work, to operate one of those tractors in that pole yard skidding poles?

A. Not particularly difficult.

Q. Does it require any great amount of skill?

A. No skill whatever.

Q. Does it require any preliminary training for the common ordinary man who is accustomed to drive a motor car to go in there and operate one of those tractors? A. No, sir.

Q. And as a matter of fact, in practical operations of the yard what has been the practice as to putting men in charge of the operation of the tractors from day to day without previous experience?

A. Well, we have taken men out of the yard off of other jobs that could operate an automobile and put them on a tractor.

Q. And what has been the practice with respect to going from the tractor to other jobs, or vice versa?

A. Well, the two tractors that Clifford and Fay Dempsey handled or drove,—they were regularly assigned to that work, but we had a Ford tractor down there that only [175] operated intermittently, and we just picked up somebody to put on it and use it as we needed it.

Q. Was one of the tractors discontinued on March 19, or immediately thereafter?

A. Yes, sir.

Q. From that time on for sometime how many tractors were you using in the yard?

(Testimony of Patrick J. Conlee.)

A. Just the one most of the time, and the small tractor part of the time.

Q. Now, did you put on a double shift sometime during the year? A. Yes, sir.

Q. Do you recall, Mr. Conlee, the dates?

A. I think it was May 15 or 16.

Q. Is it not on now, is it? A. No.

Q. When was it discontinued?

A. Discontinued on August 15.

Q. There was a double shift for three months?

A. Yes.

Q. Now, during that period did you have more tractors in use or how was it?

A. Same number of tractors, but we worked them through both shifts.

Q. I got the impression that there were three tractors in use during that period? [176]

A. Yes, sir.

Q. But before that you were using only the two, were you not? A. Yes, sir.

Q. Now, what are you using now?

A. We still have three.

Q. Are you still using three or two?

A. Three.

Q. Are you using three now? A. Yes.

Q. Now, at the time Mr. Damschen was laid off on March 19, 1941, who were the other tractor drivers?

A. Fay Dempsey was driving one tractor, and I don't recall just who was driving the small tractor.

(Testimony of Patrick J. Conlee.)

I don't think there was anybody regularly assigned to drive it.

Q. Who and what type of man is Fay Dempsey?

A. Fay Dempsey,—well, he is a crippled hunch-back.

Q. Is he capable of doing any other type of work in that yard except drive that tractor?

A. No, sir.

Q. Do you wish to keep him on that job?

A. Yes, sir.

Q. And have you kept him on that job?

A. Yes.

Q. And is he capable of operating a tractor?

[177]

A. Yes, sir.

Mr. Potts: You may examine.

Mr. Brooks: May we go off the record?

(Discussion off the record.)

Trial Examiner McNally: After discussing the matter off the record with counsel, it has been agreed that we should adjourn now until 9:30 in the morning. The hearing stands adjourned until 9:30.

(Whereupon the hearing was adjourned at 4:35 p.m. September 15, 1941, until 9:30 a.m. September 16, 1941.) [178]

City Hall,
Priest River, Idaho.
September 16, 1941.

The above-entitled matter came on for hearing at 9:30 o'clock a.m., pursuant to adjournment as follows:

Before: P. H. McNally, Trial Examiner.

Appearances:

Charles M. Brooks, Esq., 407 U. S. Court House, Seattle, Washington, appearing for National Labor Relations Board, Nineteenth Region.

C. H. Potts, Esq., Coeur d'Alene, Idaho, appearing for Schaefer-Hitchcock Company.

Charles A. Paddock, Esq., 737 East 34th Street, Spokane, Washington, appearing for United Brotherhood of Carpenters and Joiners of America, affiliated with A F of L. [179]

PROCEEDINGS

Trial Examiner McNally: The hearing will come to order, please.

Mr. Potts: Mr. Conlee, will you resume the stand. You may cross examine.

PATRICK J. CONLEE,

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Brooks) Mr. Conlee, prior to assuming your present duties, were you employed by the Schaefer-Hitchcock Company?

A. Yes, sir.

Q. Where were you employed immediately preceding your coming to Priest River?

A. The Consolidated Treating Company in Minneapolis.

Q. And where were you employed with the Schaefer-Hitchcock Company?

A. Well, I was a representative of the Schaefer-Hitchcock Company with the Consolidated Treating Company.

Q. When did you first go to work for the Schaefer-Hitchcock Company?

A. Well, I have been connected with the Schaefer-Hitchcock Company since 1929.

Q. Have you been employed by the company at its yard in Minneapolis? [182]

A. Yes, sir.

Q. When did you work there?

A. From 1930 to 1938, I believe.

Q. What capacity did you serve the company in there? A. Superintendent.

Q. You were superintendent of the entire yard?

(Testimony of Patrick J. Conlee.)

A. Yes, sir.

Q. During that whole time? A. Yes, sir.

Q. While you were superintendent in the Minneapolis yard, was there a strike? A. Yes, sir.

Q. What year was that?

A. I am not sure whether it was 1935 or 1936, the first one.

Q. And was there another one?

A. Another one, I think, in 1938.

Q. In your capacity as superintendent in that yard, did you deal with the union on behalf of the company?

A. Yes, sir. I would like to amplify that answer, however. The industry was organized back there. It was not only our yard that was on a strike but it was all the pole yards.

Q. The entire industry? A. Yes.

Q. When you were invited to this meeting at the hotel held [183] on February 15 you were told what the purpose of the meeting was, were you not?

A. In a general way.

Q. That is, they told you they were going to find out what the views of the employees were?

A. The opinion of the employees, yes.

Q. With reference to a union? A. Yes.

Q. They told you that when they invited you?

A. Yes, sir.

Q. And you at first hesitated, I believe you said?

A. Yes, sir.

Q. —as to whether or not you should go?

(Testimony of Patrick J. Conlee.)

A. Yes.

Q. Had you told Con Wear about your experience in Minneapolis before February 15?

A. I don't recall that I had mentioned it when I first came out. Shortly after I was here Mr. Wear, I believe, mentioned about this car that he testified to yesterday that had these markings on it of the union.

Q. That was sometime in late 1939 or early 1940, probably?

A. Yes, that was shortly after I came out here, and I think he asked me what those markings were, and I told him the business back there had been organized. I don't recall any particular conversation, but it seems to me that—— [184]

Q. Well, you told him too that they had had a strike in that yard too, didn't you?

A. I may have at some time during the conversation.

Q. You did tell the employees gathered at the Peterson Hotel on February 15 that you did not consider the organization of the Minneapolis yard had benefited the men to any extent, did you not?

A. I don't just know.

Q. Well, that in substance?

A. I think I said I did not think the men had benefited.

Q. By the union?

A. By the union, due to the fact that they were

(Testimony of Patrick J. Conlee.)

called on a strike for so long that they had not gained anything, or something to that effect.

Q. Have you been employed, Mr. Conlee, as a tractor driver? A. No, sir.

Q. I understood you to say yesterday that there was absolutely no skill required to drive a tractor?

A. Yes, sir.

Q. Is that your opinion? A. Yes, sir.

Q. Well, isn't it true, Mr. Conlee, that in the operation of the tractor at the pole yard, where the tractor pulls these poles, unless the corners are turned properly, for example, that there might be damage done? [185] A. That is true.

Q. In other words, driving the tractor with a bunch of poles chained to the tractor would be a little different than just getting into the tractor and driving it around with nothing attached to it, isn't that right?

A. Well, yes, it would be a little different.

Q. Now, Damschen's work as a tractor driver was perfectly satisfactory to you, wasn't it?

A. Quite satisfactory.

Q. Did you make the decision yourself without consultation with anyone else to lay off Damschen or discharge him? A. Yes.

Q. And I understood from your testimony that the only reason for that, as you testified, was that you were going to discontinue one tractor on March 19? A. That is right.

(Testimony of Patrick J. Conlee.)

Q. When did you decide to discontinue one tractor on March 19? [186]

A. Well, I think probably a few days previous to that. The tractor was getting worn out, and we had to make some repairs or trade it in for a new one.

Q. Damschen's tractor was just about worn out?

A. No, it wasn't Damschen's tractor; it was the other tractor.

Q. It was the one Dempsey was driving?

A. Yes.

Q. Fay Dempsey? A. Yes.

Q. So when you decided that the tractor that Dempsey was driving was about worn out, you decided to discontinue one of the tractors?

A. Yes.

Q. And you thought,—you think it was two or three days prior to March 19 that that decision was reached?

A. Well, it may have been three or four days or five days previous to that.

Q. How did you make up the time, and what procedure did you go through to turn in the time of the employees that they might get their checks?

A. Well, the time is checked in our office down there, and at the end of the pay period, which is on the 15th and the 1st, we send in the time to the Sandpoint office.

Q. You keep the time of all the employees, do you not? A. Yes, sir. [187]

(Testimony of Patrick J. Conlee.)

Q. Do you remember how many employees you had about the 15th of March when you turned in the time on that date? A. Possibly about 30.

Q. And you turned in the time on the 15th and the checks are made up in Sandpoint? A. Yes.

Q. And then delivered back here, and the men are delivered their checks possibly three or four days after the pay period ends, is that right?

A. Well, the checks generally go up to Sandpoint the day following the end of the pay period. Sometimes they come back the same day, and sometimes the next day and are delivered to the men as soon as they are returned.

Q. When did you decide with reference to the date that you decided to discontinue the tractor that Damschen would be the one to be laid off?

Trial Examiner McNally: Will you please read that question?

(Question read)

A. Well, I think when I decided to lay off the tractor.

Q. Why didn't you tell Damschen at that time?

A. Why?

Q. Yes.

A. Well, I don't know as it is the general practice to tell men beforehand that they are going to be discharged.

Q. Is that the only explanation you have for not telling him? [188] A. I think so.

(Testimony of Patrick J. Conlee.)

Q. Did you tell the company office in Sandpoint at the time you turned in Damschen's time for the pay period ending March 15 that he was to be laid off? A. No, sir.

Q. You gave Damschen's two checks to him on the 19th, did you not? A. Yes, sir.

Q. When was the check made out paying him for the time from the 15th to and including the 19th?

A. The day that the checks came up from Sandpoint.

Q. And were they made out—was that small check made out at Sandpoint? A. Yes, sir.

Q. How did you take care of that?

A. I phoned to the office that morning to make his check out to the end of that day.

Q. Well, if you had decided three or four days before that to lay Damschen off, why did you not tell the company office in Sandpoint at the time you sent in the hours that he had worked on the 15th or 16th?

A. Well, I was not sure what day the checks came back. I wanted to pay him up to the time when he got his paycheck.

Q. And you received the checks back on the 19th, and then after you received them, you telephoned Sandpoint? [189]

A. No, I understood the checks were coming back on the 19th, and I phoned Sandpoint on that date sometime prior to noon, possibly.

(Testimony of Patrick J. Conlee.)

Q. To whom did you talk?

A. I think that I talked with the Cashier at the Sandpoint office.

Q. You didn't talk to Mr. Schaefer?

A. No, not to Mr. Schaefer, no.

Q. Well, hadn't you discussed this question of laying Damschen off with Mr. Schaefer, at all?

A. No, sir.

Q. Well, on the day that you decided that Damschen would be the man that you would discharge, did you give any consideration at all to putting Damschen on some other job because of his long experience with the company? A. I did not.

Q. You did not give that any consideration?

A. No, sir.

Q. You knew that you had many men working there that had been with the company a much shorter time than Damschen, didn't you?

A. I had a few men there, yes, sir, that was.

Q. And you knew that Damschen could do that work, didn't you?

A. Well, I wasn't so sure that he could do the work around the yard other than drive a tractor.

Q. Had you ever given him since you have been there an [190] opportunity to do other kinds of work?

A. Not continuously, no. There were times when he was working on the tractor that he did other work for short periods.

(Testimony of Patrick J. Conlee.)

Q. When you laid this tractor off, didn't you have men who were driving teams? A. Yes.

Q. Damschen had driven a team for you?

A. Not for me, he didn't.

Q. Didn't you have him drive team?

A. Not for me.

Q. Don't you recall a week in 1940 when he did that? A. It may be possible.

Q. Instead of laying him off altogether, you took him off the tractor and left Fay Dempsey on, and you put Damschen driving a team; don't you remember that?

A. I don't recall it; it may be possible.

Q. Did you lay off or discharge, whatever term you prefer to use,—did you lay off Damschen in 1940, that is, completely off the payroll?

A. Well, I can't remember whether we were shut down for any period in 1940 or not.

Q. Well, if you laid him off, it was when the yard was completely down or almost down, isn't that true? A. That is true.

Q. Now, on the 19th of March, Damschen was the only man discharg- [191] ed or laid off, wasn't he? A. Yes, sir.

Q. And that is the first time you ever laid Damschen off when he was the only one laid off, isn't that right?

A. As far as I can remember, yes.

Q. You had after the 19th of March two tractors running, you say? A. Yes, sir.

(Testimony of Patrick J. Conlee.)

Q. What did you do with Dempsey's tractor that was worn out?

A. It was tied up for a couple of weeks and eventually traded in for a new one.

Q. Dempsey then went on to Damschen's tractor?
A. Yes.

Q. And Dempsey's tractor was tied up?

A. Yes.

Q. And did you use the little Ford tractor?

A. Occasionally.

Q. So you had two tractors running after the 19th, and that was the tractor of Damschen's and the little Ford tractor?
A. Yes, sir.

Q. Who was operating the Ford tractor from the 19th for the next two weeks?

A. I don't think there was anybody regularly assigned to drive it.

Q. And why didn't you let Damschen run that after the 19th? [192]

A. Well, I just did not want Damschen, I guess was the reason.

Q. Just did not want him?
A. Yes.

Q. Now, how long after the 19th was it until you bought this new tractor?

A. I could not say, but I think that it was at least two weeks or more.

Q. Isn't it a fact that within a week you had three tractors operating after the 19th?

A. As I stated before, as far as I can remember on that, it was about two weeks.

(Testimony of Patrick J. Conlee.)

Q. Didn't you bring Fay Dempsey's tractor back out of the garage and start it operating again after the 19th before you bought the new one?

A. No, sir.

Q. It just stayed there until you bought the new one? A. Yes.

Q. When you bought the new tractor not more than two weeks after the 19th, you then had three tractors running?

A. I think that the Ford tractor had gone out about that time.

Q. Whom did you put on the new tractor?

A. I don't recall whether it was Orville Gillespie or Clyde Wear; one of those two men.

Q. Now, you say you think that the Ford tractor was gone by that time. What do you mean? [193]

A. Well, the Ford tractor was used by Mr. Schaefer in doing some of his farm work.

Q. Well, you continued, did you not, to use the Ford tractor when you needed it around the yard?

A. When we needed it, yes, if it was available.

Q. Now, isn't it true that within two weeks after Damschen was discharged, you hired new men in the yard?

A. Well, I don't recall how long after. As soon as business picked up a little, I put on some additional men.

Q. Why didn't you rehire Damschen?

A. Well, Mr. Damschen never came to me for re-employment.

(Testimony of Patrick J. Conlee.)

Q. Well, you knew that he had requested re-employment on the 22nd day of March, did you not?

A. Yes.

Q. Then why didn't you notify him? You knew where Damschen lived?

A. Yes, sir.

Q. You knew Damschen had worked for the company for a number of years?

A. Yes, sir.

Q. Do you have any other explanation for not offering him re-employment?

A. None further than the statement I made a little while ago that I just did not want him any more.

Q. Isn't it true, Mr. Conlee, that one reason and the [194] principal reason that you did not offer Damschen employment when business picked up was because he had taken this matter up with the union?

A. I don't think that that was a particular reason. I think it may have had some bearing on it.

Q. Well, that was one of the reasons, wasn't it?

A. Not the particular reason, no.

Q. Well, was it a reason?

A. I would not say it was a reason.

Q. The only reason that you can offer then is that you just did not want him?

A. Yes, sir.

Q. You did not like Damschen?

A. Oh, I had nothing particularly against him.

Q. You just did not want him to work for you?

A. Just did not want him to work for me.

Q. And yet his work was quite satisfactory?

(Testimony of Patrick J. Conlee.)

A. Yes, quite.

Mr. Brooks: No further questions.

Mr. Potts: I think that is all. That is all, Mr. Conlee.

Trial Examiner McNally: Just a minute. I would like to have the record show a description of the physical lay-out of the yard and the various operations that are performed there, and also how Mr. Conlee carries out his functions.

Mr. Brooks: Do you prefer that I interrogate him? [195]

Trial Examiner McNally: I am just asking that it be done. It does not matter who does it. I just wish that information to be developed for the record.

Mr. Potts: Mr. Schaefer just suggested to me that the yard is in active operation right now, and perhaps it would be a good thing to go down and take a look at it to illustrate it.

Trial Examiner McNally: I appreciate Mr. Schaefer's suggestion. The only objection to it is this, that the Trial Examiner does not finally decide this case. It is decided on the basis of the record, and hence my suggestion that a description be incorporated in the record.

Mr. Potts: I appreciate that any inspection would have to be supplemented by a description in the record. I should be very glad to bring it out. I think that we can do it without difficulty.

(Testimony of Patrick J. Conlee.)

Redirect Examination

Q. (Mr. Potts) Mr. Conlee, you have heard the Examiner's request for a description of the yard. I think perhaps it will be necessary for you to go ahead and give a general description of the set-up there, first, with respect to the yard's location with reference to the town of Priest River.

A. It is located just east of the town of Priest River.

Q. That is, it is in the outskirts of the town, is it not?

A. Yes.

Q. And about what area does it cover? [196]

A. Well, I would say possibly 17 or 18 acres.

Q. And what shape is it?

A. Quite irregular. It follows the river bank.

Q. Now, is there a railroad spur running into the yard?

A. Two spurs,—one spur and then a branch off of that.

Q. And how are the poles handled as they are brought in from the woods? What is done with them?

A. The majority of the poles are delivered to the yard on trucks and they are distributed after being unloaded from the trucks to the various piles.

Q. Are there skidways or decks that they are put on?

A. Yes, sir.

Q. And how are they distributed?

A. Well, the poles are classified and then distributed as to their classification.

(Testimony of Patrick J. Conlee.)

Q. Yes, but in what manner?

A. By teams and tractors.

Q. And is that what these tractors are used for?

A. Yes.

Q. To pull these poles around? A. Yes.

Q. And get them in their proper location on the skidways or decks? A. Yes, sir.

Trial Examiner McNally: Mr. Potts, so that we may be [197] sure, would the description Mr. Conlee has given be true as to February and March of 1941?

Q. (Mr. Potts, continuing) Has there been any change in the condition of the yard since February and March, 1941?

A. None; not any general change, no.

Q. And are the conditions that you are describing the conditions that existed during the months of February and March, 1941? A. Yes.

Q. Of course, at certain seasons of the year, there are no poles being brought into the yard?

A. That is right.

Q. And that was true in February and March?

A. Yes.

Q. At that time, the work consisted of activities incident to shipment of poles?—shipment of poles from the yard? A. Yes, sir.

Q. During the summer, of course, you have been engaged in the other end of the operation, having poles brought into the yard, have you not?

A. To deliver to the yard, yes.

(Testimony of Patrick J. Conlee.)

Q. And during that period, what effect does that have on the number of men employed?

A. It increases the employees according to the number of poles being delivered to the yard. [198]

Q. It increases the crew in the yard to handle it?

A. Yes, sir.

Trial Examiner McNally: Is that when you got up to 70 employees, as you indicated in the answer?

Q. (Mr. Potts, continuing) Mr. Conlee, when you are at the peak of the season, with poles coming in from the woods and at the same time shipments are being made from the yard, about what does the crew aggregate in numbers?

A. Well, ordinarily about 40 or 45 men.

Q. At this peak period, doesn't it get up as high as 70?

A. Well, this year our business both coming in and going out picked up considerably, and we worked two shifts.

That is the first time since I have been here that we worked two shifts.

Q. That was during the period from——

A. May 15 to August 15.

Q. May 15 to August 15 that you had the two shifts?

A. Yes.

Q. And is that the time the crew numbered about 70?

A. About 70 men, yes, sir.

Trial Examiner McNally: Then the low during the slack season runs about 26, approximately?

(Testimony of Patrick J. Conlee.)

Q. (Mr. Potts, continuing) Is that correct?

A. Yes, 20 or 22.

Q. About how many? [199]

A. About 20 or 22 men.

Q. When there are no poles coming in and at the low point of the season?

A. Yes.

Q. With least activity?

A. When our orders for shipments out are about normal and no poles are coming in, our crew averages around about 20 men.

Q. And that was the condition in February and March, was it, 1941?

A. Yes, sir.

Q. Now, where was your office located in the yard?

A. About centrally located.

Q. That is in the center of the yard lengthwise and centrally in width?

A. Centrally lengthwise and to one side in width.

Q. Now, on an average day, just about what is your activity? How much time do you spend in the office and how much in the yard?

A. Well, I spend most of the time in the yard: possibly not over an hour or so.—generally after the whistle blows, in the office.

Q. You mean the time you spend in the office is an hour or so after the whistle blows?

A. Yes.

Q. After it blows when? [200]

A. At night.

Q. Then you stay in the office?

A. Yes.

Q. But during the day, what do you do in the yard?

(Testimony of Patrick J. Conlee.)

A. Well, I am supervising the work that is going on.

Q. What do you do in the way of supervising? Do you walk over the yard?

A. I tramp around and see that things are being done.

Q. You go around where the men are working and see how they are doing the work and so forth, and give instructions, do you? A. Yes, sir.

Q. Now, is that your regular and has it been your regular custom, to do that, since you have been there? A. Yes, sir.

Q. So that, during the working day, you are in touch with the operations that are going on throughout the yard? A. Yes, sir.

Q. Now, do you have anyone with you in the office? A. No, sir.

Q. And do you keep the time of the men?

A. Yes, sir.

Q. And report it to the office at Sandpoint for the checks, is that correct? A. Yes, sir.

Mr. Potts: Mr. Examiner, is there any other phase of this [201] that you wish?

Trial Examiner McNally: I believe that covers it. I understand from the evidence that Mr. Conlee gets his instructions from Sandpoint, from the Company office there. Is that correct?

The Witness: Yes. The orders are delivered from the Sandpoint office. They come through the Sandpoint office to me.

(Testimony of Patrick J. Conlee.)

Q. (*Trial Examiner Schaefer*) Do you get instructions over the phone?

A. Yes, sometimes the orders are phoned to me.

Q. There is a phone in your office there?

A. Yes, sir.

Q. Is that the main source of communication with the Sandpoint office? A. Yes, sir.

Q. When you are in the yard, there is nobody there to answer the phone?

A. The office is connected with our steam plant, and the engineer looking after the steam plant would as a rule answer the telephone if I did not answer it in the office.

Q. Are those the only two buildings you have, the office and steam plant?

A. No, we have several other buildings, but those are the only two with a phone. We have our incising machine building and a couple of storehouses. [202]

Q. Do these men work in groups or by themselves, or how? A. Generally in groups.

Q. And they are spread in different parts of the yard? A. Yes, sir.

Q. Now, you supervise them by telling them what you want them to do? A. Yes, sir.

Q. When you are not there, do you depend on the men to do what you tell them?

A. If I am only away for a short period.

As a rule, the work is laid out. They probably have their work laid out for the whole day.

(Testimony of Patrick J. Conlee.)

Q. Is anyone in the group in charge of the others?

A. Well, the inspectors as a rule have,—while they don't have any authority, they kind of oversee the work the others are doing.

Q. Now, just what work do they do, and what work do they oversee?

A. The inspector sends in poles to the treating plant to be treated. He inspects the poles and directs the teams hauling the poles from the pile to the treating plant. They are more or less under his direction. He advises them what poles to take, and where to take them.

Q. How many inspectors did you have out there in the yard in February and March, or normally?

[203]

A. Well, I think in February and March, we had two.

Q. Who were they?

A. Jack Webb and George Cronkright or Fred Lebert. Cronkright is there all the time, but when he wasn't there, he was one of the inspectors.

Q. When Mr. Wear is not doing utility work, what does he do out there?

A. Well, Mr. Wear does, as he stated yesterday, he either loads poles or runs one of the machines. We have many occasions where we have to check our stock to see whether we have certain sized poles or poles that fit a certain order, and he checks those up. His work is more or less general fill in here and

Testimony of Patrick J. Connelley

Q. There are no such things that I may assign to him.

Q. Mr. Connelley, there was some mention made by other witnesses about a general raise being given to the employees sometime after January 1, 1941. Can you tell us about that?

A. Well, I know there was such a raise that was put into effect by the office at Sandpoint.

Q. Do you know what date it was put into effect?

A. I don't recall just exactly, no.

Q. Do you know if what was the employees of the bank were notified of the raise?

A. I think that Mr. Schaefer advised me that there was to be such a raise and I told the boys.

[239]

Q. Do you know when you told them there was going to be a raise or that they were given a raise?

A. Well, I could not say definitely; possibly a day or two before the first of the month or a few days before the raise went into effect.

Q. Well, when did the raise go into effect?

A. I am not sure whether the first of April or the first of May.

Then Examiner McNaughton: Can that be determined?

The Witness: Yes, it can very easily be determined. Our records would show it.

Mr. Schaefer: I would say it was the first of May, official.

Then Examiner McNaughton: Will counsel see on what date the raise was put into effect, and I would

(Testimony of Patrick J. Conlee.)

like to have Mr. Conlee tell us when and in what way he notified the employees of the raise. If we can have the information as to what pay period during which the raise became effective, will counsel furnish that information?

Mr. Potts: We will find out. We will probably have to call the Sandpoint office.

Trial Examiner McNally: Is there anything further of the witness?

Mr. Potts: Just a question or two.

Redirect Examination

(continued)

Q. (Mr. Potts) You mentioned orders received from Sandpoint [205] or from the Sandpoint office, Mr. Conlee. I want to be clear just what we have in mind by those "orders". When you said "orders", what did you refer to?

A. Shipping orders, orders for poles to be shipped.

Q. Orders for the shipment of poles?

A. To destination.

Q. They come from the Sandpoint office?

A. Yes.

Q. You don't get orders from the Sandpoint office how to run the pole yard? A. No.

Q. Or any instructions from the Sandpoint office in that respect? I mean aside from the general operations of the pole yard?

(Testimony of Patrick J. Conlee.)

A. The general operation of the pole yard has been left to my judgment.

Q. Now, Mr. Schaefer, president of the company, resides in Priest River? A. Yes.

Q. And you confer with him, or he comes to the yard from time to time, does he not?

A. Daily.

Q. And you confer with him on general matters?

A. Yes, sir.

Q. —in connection with the operations of the yard? [206] A. Yes.

Q. And do you receive instructions from him from time to time? A. Occasionally.

Mr. Potts: That is all.

Mr. Brooks: That is all.

Trial Examiner McNally: You may be excused.

(Witness excused)

JOHN E. SCHAEFER

was duly sworn as a witness by and on behalf of the Respondent and testified as follows:

Direct Examination

Q. (Mr. Potts) State your name, please?

A. John E. Schaefer.

Q. Mr. Schaefer, where do you reside?

A. Priest River.

Q. What position or connection do you have with the respondent Schaefer-Hitchcock Company?

(Testimony of John F. Schaefer.)

A. I am president of the Schaefer-Hitchcock Company.

Q. Have you been connected with the company since its organization? A. Yes.

Q. Now, in connection with the Priest River pole yard, just what activities do you pursue regarding the conduct of the pole yard, Mr. Schaefer?
[207]

A. Why, occasionally I talk to Mr. Conlee if I see anything wrong; then I usually call his attention to it, and that is about the extent of my activity.

Q. Well, as to details of the operation, do you handle them at all? A. No.

Q. That is his job? A. That is his job.

Q. And in that respect, is his position and are his activities similar to those of men in like position in other pole yards? A. Yes.

Q. Now, Mr. Schaefer, did you know of the discharge of Mr. Damschen prior to the time that he was laid off? A. No.

Q. When did you first learn of it?

A. I think I first learned of it when Mr. Paddock and Mr. Damschen came in the office at Sandpoint. I am not positive about that.

Q. Now, at that conversation of Mr. Paddock and Mr. Damschen and I think Mr. Butler, also—

(Testimony of John E. Schaefer.)

A. Mr. Butler from Newport, also, yes.

Q. What is your recollection of the conversation with reference to what you said as the reason for Mr. Damschen's discharge, that is to say, did Mr. Paddock make some statement to the effect that he believed Damschen had been discharged for union [208] activity? A. Yes, he did.

Q. And did you make a reply to that statement?

A. Yes.

Q. What is your recollection as to what you said?

A. I told him that I did not have any idea why he was discharged unless it was because I had complained several times that he was too rough with the tractor. And I said positively that I did not know anything about it until I saw Mr. Conlee. Mr. Paddock said if I would reinstate him right then, why, they could call the complaint off.

I told him that I would not do that, that I would have to see Mr. Conlee first, that I did not know anything about it.

Q. Then did you later during the day see Mr. Conlee?

A. I did in the afternoon, and he said he could not put Mr. Damschen back, or he would not.

Q. Then did you later have a call from Mr. Damschen?

A. Yes, I did. He came to my house, and asked how about it, and I told him at the present time he

(Testimony of John E. Schaefer.)

could not go to work, but later on we might put him on. Damschen also talked to Mr. Conlee. I did not interfere with that. I told him it was entirely up to him as to what he was going to do about it.

Q. Well, you did not object to the fact or the action of Mr. Conlee in discharging him?

A. No. [209]

Q. Now, Mr. Schaefer, did you know of any union activity here in Priest River in connection with your plant or pole yard during February or March of 1941?

A. No, I did not.

Q. What is the attitude of your company with respect to labor unions and what was it at that time?

A. Well, Mr. Paddock said he thought or at least Mr. Damschen contended that he was discharged on account of union activities. I told him that I did not know until they came in there that he belonged to the union, or ever said anything about a union. But I said, "To demonstrate that we are not opposed to unions, when we took over the Weyerhaeuser plant at Bovill, they had a union there, and it automatically was cancelled because we took the yard over, and I told our foreman there—" I think Mr. Paddock yesterday said that I told the men that was not true—"I told the foreman that he should go to the men and tell them that if they wanted to organize, it would be perfectly satisfactory with us; that we would be glad to sign up with them."

(Testimony of John E. Schaefer.)

I tried to demonstrate to Mr. Paddock that we were not opposed to unions.

Q. And is that a fact? A. That is a fact.

Q. Have you at any time taken any action antagonistic to the unions or to the men organizing in Priest River?

A. No, not since the IWW was organized here right after the War. [210]

Q. Now, you are going back to first war days, aren't you? A. Yes.

Q. As a matter of fact, were you yourself a member of a labor union?

A. Yes, I was at one time.

Q. Mr. Schaefer, you don't recall positively when this wage increase took effect in the spring of 1941?

A. I would not want to say positively, but I am quite certain that it was the first of May.

Q. Did you authorize the increase at that time?

A. Yes.

Q. What was it? Just a blanket increase of so much an hour?

A. Five cents an hour with the exception of some men that we did not raise that we were paying really more than the regular wage.

Q. Well, the five cents was as to the lower brackets? A. Yes, all the way through.

Q. On common labor? A. Yes.

(Testimony of John E. Schaefer.)

Mr. Potts: I believe that is all unless Mr. Schaefer thinks of something I have not directed your attention to. I don't think of anything else.

The Witness: No, there isn't anything that I can recall or add to what I have already said.

Cross Examination [211]

Q. (Mr. Brooks) Is it possible that this raise went into effect before May 1st?

A. It is possible; I would not be sure.

Q. Do you recall that at this conversation with Mr. Paddock and others on the 22nd of March, you informed them that a raise was to be put into effect?

A. Informed Mr. Paddock?

Q. Yes. Do you remember mentioning it at that time?

A. No, I don't.

Q. You heard Mr. Paddock's and Mr. Damschen's testimony that you did mention that?

A. Probably. I don't recall it.

Trial Examiner McNally: The Witness does not recall the testimony or the statement? Which is it?

Mr. Brooks: That is what I want to know.

Q. (Mr. Brooks, continuing) You don't recall their testimony to that effect, or you don't recall whether you made such a statement? Which is it?

A. I don't recall whether I made such a statement.

Q. When did you decide to give this blanket raise?

(Testimony of John E. Schaefer.)

A. I don't recall that. Mr. Hitchcock and I made that decision together. I cannot tell you when we did that, but I think that it was shortly before we made the raise.

Q. Was it after the discharge of Damschen?

A. Yes, I think so. [212]

Q. What was the motivating factor, if there was one, that caused you to give this blanket raise?

A. Well, we had raised in all our yards.

Q. Do you have a contract or contracts with labor organizations in any of your Idaho yards?

A. No.

Q. Well, you can determine by a telephone call the effective date of the five-cent raise, can you?

A. I can find out in five minutes.

Q. As I understand, you had nothing whatsoever to do with the discharge of Damschen?

A. No, I had not.

Q. And you have nothing whatsoever to do about his not being re-employed? A. No.

Mr. Brooks: I have no further questions.

Redirect Examination

Q. (Mr. Potts) Well, Mr. Schaefer, mention has been made of one wage increase in the spring of 1941. Was there a wage increase preceding that?

A. Possibly there was.

Q. About the first of the year? Do you recall?

A. I think we made two raises, but I can't recall. I can find out.

Q. Do that, please. [213]

(Testimony of John E. Schaefer.)

Trial Examiner McNally: What percentage of the employees out there are common laborers or what percentage got a raise in this five-cent increase? Can you tell us that?

The Witness: I think that they all got a raise with exception of one or two. Mr. Cronkright was one that we did not raise because I had raised him several times before and we were paying him more than we ordinarily,—that a checker was getting, and we could not give him any more money, so we did not raise him, and possibly there was one or two others.

Q. (Trial Examiner McNally) Do I understand that you class all the labor out there with the exception of Mr. Cronkright and perhaps Wear as common labor?

A. They are all practically laborers with the exception of the hoist man and the incising man, who incises the poles.

Q. They are what? How do you classify them?

A. Well, we just pay them more money. They are not classified.

Q. Well, from the witnesses who have testified, I understand some of them are being paid a higher hourly rate than others?

A. That is true, because we figure they are worth more money on that particular job. Incising is a very particular job, and we try to keep a certain man on that all the time, so that he is competent to handle that machine. We can't

(Testimony of John E. Schaefer.)

put an ordinary laborer in there to run it. So we pay him more wages, and the same with the steam hoist. We have a Mr. McKee who has been there with us running the steam hoist, oh, I don't remember, 10 [214] or 12 years, and we just classify those fellows who have special jobs and pay them more money. We have had no regular system of classification of men.

Q. (Mr. Potts) Mr. Schaefer, you start out with a specific basic wage that is supposed to be the minimum wage for common labor?

A. That is it.

Q. And that is general throughout the area?

A. Yes.

Q. And that is what; what is your basic wage?

A. 65 cents per hour.

Q. Now 65. It was 60? A. Yes.

Q. And that is what everybody was paid?

A. Yes.

Q. They were all common labor as far as the wage scale is concerned except those three or four men? A. Yes, those three or four.

Q. And they were really men whom you consider skilled labor? A. Yes.

Q. That is to say, they are semi-skilled, anyway? You wanted particular men with particular qualifications for those two or three jobs?

A. Yes.

Q. I think that I asked you, but I would like to ask it again, aside from those few jobs of that

(Testimony of John E. Schaefer.)

character of skilled or semi- [215] skilled, the basis is all on the common labor wage scale?

A. That is true.

Trial Examiner McNally: Then, Mr. Schaefer, if you will find out what the basic scale was at the yard as of January 1, 1941, and what changes if any, were made in the basic rate up until about May——

The Witness: May 1st?

Trial Examiner McNally: Up until the present time.

Q. (Mr. Potts, continuing) There have been no increases since May, have there? A. No.

Mr. Brooks: Mr. Schaefer, I have one question that might be answered by either Mr. Schaefer or Mr. Conlee, and that is with reference to the men, if they can be named, that are receiving more than the minimum rate at the pole yard here. Can you answer that question?

The Witness: I think that Mr. Conlee can answer it better than I can. I never paid much attention to it.

Mr. Brooks: While Mr. Schaefer is securing that information over the phone, I would like to request the Examiner to call Mr. Conlee back for me to ask that question.

Mr. Potts: I suggest, Mr. Brooks, that we recess at this time to enable Mr. Schaefer to get the information requested; and during the recess, I

(Testimony of John E. Schaefer.)

think perhaps Mr. Conlee can figure out the answer to Mr. Brooks' question. [216]

Trial Examiner McNally: We will recess for 15 minutes.

(Thereupon at this time a fifteen minute recess was taken, after which proceedings were resumed as follows:)

Trial Examiner McNally: The hearing will come to order, please. You may proceed.

Q. (Mr. Potts, continuing) Mr. Schaefer, will you please resume the stand. (Witness does so.)

Did you ascertain when the wage increase went into effect in the spring of 1941? A. I did.

Q. What day? A. May 1st.

Q. What was the basic wage on January 1, 1941 for common labor? A. 60 cents.

Q. 60 cents an hour? A. Yes, sir.

Q. What was the basic wage after May 1st?

A. 65 cents.

Q. Is that the wage now? A. Yes.

Q. Now, talking about the wage increases, what is the fact as to wage increases generally in this area, that is, north Idaho, eastern Washington, and down as far as Lewiston, Idaho, where the Potlatch Forests is, during the past year? What about [217] the wage increases throughout the area, in the lumber industry?

A. That was a general increase both in the lumber and pole industry.

(Testimony of John E. Schaefer.)

Q. Now, when was it that you took over the Bovill yard from Weyerhaeuser?

A. I would think last fall sometime. It was in 1940.

Q. Was there any connection between the wage increase and the conditions down at the Bovill yard? A. Yes.

Q. What was it?

A. We raised the wages up here in May the same as they had down there, the same wage.

Q. That is, they had that wage?

A. They already had that.

Q. They already had that? A. Yes.

Q. Well, what is the fact as to whether or not Potlatch Forests had granted one or more wage increases generally?

A. They had granted two increases.

Q. Two increases? A. Yes.

Q. Since when?

A. In the woods, lumbering, this year.

Q. This year?

A. Yes. In the logging operations they have raised their [218] wages to 70 cents, and in the pole yards, it is still 65 cents. I am not positive, but it seems to me that we raised our wages at Potlatch to 70 cents,—at Bovill, rather.

Q. Now, there was no other wage increase on common labor during the past year, was there, by you? A. No, we had an increase last year.

Q. About what time last year?

(Testimony of John E. Schaefer.)

A. Well, I think that it was in the latter part of the year. We raised from 55 to 60 cents.

Q. As far as you know, have your wage increases been in conformity with the general conditions in the district, and the actions of others in the industry? A. Yes.

Trial Examiner McNally: What was the raise in the fall of 1940? From what to what?

The Witness: From 55 to 60. I don't know whether it was in the fall or last summer, but there was one raise in 1940. I think that Mr. Conlee knows more about it.

Mr. Conlee: I think that it was the latter part of the year. I am not sure, but I think it was along in October and November.

Trial Examiner McNally: That is, the 60 cents was in effect on January 1, 1941?

Mr. Conlee: Yes.

The Witness: Yes. [219]

Trial Examiner McNally: Anything further?

Mr. Brooks: No.

The Witness: You wanted to find out about the men that we paid more than the regular wage?

Mr. Brooks: Oh, yes; do you have that information?

The Witness: Yes.

Mr. Brooks: Will you state for the record the names of the employees who are working at the pole yard here in Priest River that receive more

(Testimony of John E. Schaefer.)

than the minimum rate, giving his name, his job, or classification, and his rate of pay?

The Witness: There is George Cronkright.

Mr. Brooks: Yes.

The Witness: He receives 80 cents an hour. He is an inspector.

Mr. Brooks: Just a minute. On Cronkright, he is the man, I believe, the record already shows is sent to different operations to do special jobs for you?

The Witness: Yes, inspecting mostly.

Mr. Brooks: And if he is not doing that special work, he inspects at the yard?

The Witness: He inspects in the woods when he is doing special work mostly.

Mr. Brooks: All right.

The Witness: And C. L. Wear, 80 cents.

Mr. Brooks: That is Con Wear? [220]

The Witness: 80 cents.

Mr. Brooks: And he is——

The Witness: He is kind of an inspector, but he can do anything in the yard.

Mr. Brooks: I think his duties have been fairly well defined already.

The Witness: I think so.

Mr. Brooks: All right.

The Witness: And R. McKee,—Rube McKee.

Mr. Brooks: That is the man who testified yesterday?

(Testimony of John E. Schaefer.)

The Witness: Yes, he is the steam hoist man.

Mr. Brooks: He has what rate?

The Witness: 75 cents.

Mr. Brooks: All right.

The Witness: And Tom Wear, 75 cents. He is operator of the incising machine. And Mr. Lebert, 70 cents. He is a pole checker.

Mr. Brooks: Is the checker's job different than an inspector's job?

The Witness: Well, in some cases it is.

Mr. Brooks: In this particular case?

The Witness: When they check poles—many cases where they check poles, they count them. Where they inspect them, they inspect for every possible defect the pole might have so that it would pass inspection, but they haven't the [221] experience Mr. Cronkright and Mr. Wear have had in inspecting.

Mr. Brooks: Any others?

The Witness: M. Morrow, 70 cents, pole checker. That is the six men who get more than 65 cents an hour.

Mr. Brooks: All others, with exception of Mr. Conlee, are receiving the basic rate of 65 cents?

The Witness: Yes.

Mr. Brooks: Was this same condition existing in February and March, if you know?

The Witness: Well, I don't know whether,—I think that some of them were raised five cents. I would not say for sure. The only ones that I

(Testimony of John E. Schaefer.)

am quite positive that we did not raise 5 cents was Cronkright, because he was already getting 80 cents, and possibly Wear, but I cannot tell you — Mr. Conlee would know, but I don't know whether the same scale was in effect in March.

Mr. Brooks: I would like to ask Mr. Conlee to tell us any differences that might have existed at that time.

Trial Examiner McNally: You may tell us from where you sit.

Mr. Conlee: Mr. Lebert and Mr. Morrow, shown there as pole checkers, were not so employed in March.

Mr. Brooks: Who, if anyone, was employed in February and March on the job that they now have?

Mr. Conlee: Jack Webb in addition to George Cronkright and Con L. Wear. [222]

Mr. Brooks: Now, did any of these men, Cronkright,—eliminate Cronkright,—did Con Wear, McKee and Tom Wear receive a raise in May?

The Witness: In May, yes.

Mr. Brooks: Five cents an hour?

Mr. Conlee: Yes.

Trial Examiner McNally: What were those three names?

Mr. Brooks: Con Wear, McKee and Tom Wear. Mr. Schaefer, one other question: Was May 1, 1941, the effective date of the raise, or was that the date the employees got their checks?

(Testimony of John E. Schaefer.)

The Witness: That was the effective date.

Mr. Brooks: In other words, their first check would be a day or so after May 15 for the period from May 1 to May 15?

The Witness: Yes.

Mr. Brooks: I have nothing else.

Trial Examiner McNally: Anything further?

(No response)

Trial Examiner McNally: Thank you, Mr. Schaefer.

(Witness excused)

Mr. Potts: The respondent rests.

Trial Examiner McNally: Any rebuttal?

Mr. Brooks: None.

Mr. Potts: We request permission to file briefs within the period allowed by the rule. [223]

Trial Examiner McNally: That is 15 days from the close of the hearing.

Mr. Potts: Yes.

Trial Examiner McNally: That permission will be granted.

Does counsel desire to argue orally?

Mr. Potts: We waive oral argument.

Mr. Brooks: I have no argument, Mr. Examiner.

It might be well for the record to show that on page 1 of Board's Exhibit 2, and in the second paragraph, that paragraph numbered (1), two corrections have been made by interlineation. The first

one is in line 4, of the paragraph numbered 1 by inserting in ink the word "principally" at the beginning of the line, and the second correction is in the same line and is made by striking out the words "and piling".

Trial Examiner McNally: Those corrections are approved by you, Mr. Potts?

Mr. Potts: Yes.

Trial Examiner McNally: Very well. Is there anything further?

(No response)

Trial Examiner McNally: I declare the hearing closed.

(At 11:10 a. m. September 16, 1941, hearing concluded) [224]

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Director of Field Division, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, "In the Matter of Schaefer-Hitchcock Company and Lumber and Saw-

mill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor," the same being Case No. C-2002 before said Board, such transcript including the pleadings, testimony, and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Charge filed by the Lumber and Sawmill Workers Union, Local #2614, sworn to March 24, 1941.

(2) Complaint and notice of hearing issued by the National Labor Relations Board August 27, 1941.

(3) Respondent's answer to the complaint, sworn to September 2, 1941.

(4) Certified copy of order designating P. H. McNally Trial Examiner for the National Labor Relations Board, dated September 12, 1941.

Documents listed hereinabove, under items 1-4, inclusive, are contained in the exhibits and included under the following item:

(5) Stenographic transcript of testimony before P. H. McNally, Trial Examiner for the National Labor Relations Board, on September 15 and 16, 1941, together with all exhibits introduced in evidence.

(6) Copy of order, dated November 7, 1941, transferring case to Board, directing that no trial examiner's intermediate report shall be issued, and directing issuance of proposed findings of fact, proposed conclusions of law, and proposed order.

(7) Copy of proposed findings of fact, proposed conclusions of law, and proposed order issued by the National Labor Relations Board, January 23, 1942.

(8) Copy of respondent's exceptions to the proposed findings of fact, proposed conclusions of law, and proposed order, together with affidavit of service thereof, sworn to February 16, 1942.

(9) Copy of decision, findings of fact, conclusions of law, and order issued by the National Labor Relations Board March 12, 1942, together with affidavit of service and return receipts thereof.

In Testimony Whereof the Director of Field Division of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 23rd day of April 1942.

G. L. PATTERSON,

Director of Field Division.

NATIONAL LABOR RELATIONS
BOARD.

(Seal)

[Endorsed]: No. 10118. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Schaefer-Hitchcock Company, a corporation, Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed April 27, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

Comes now the National Labor Relations Board, petitioner in the above proceeding, and, in conformity with the revised rules of this Court heretofore adopted, hereby states the following points as those on which it intends to rely in this proceeding:

1. Upon the undisputed facts, the Act is applicable to respondent's operations.

2. The Board's findings of fact are fully supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

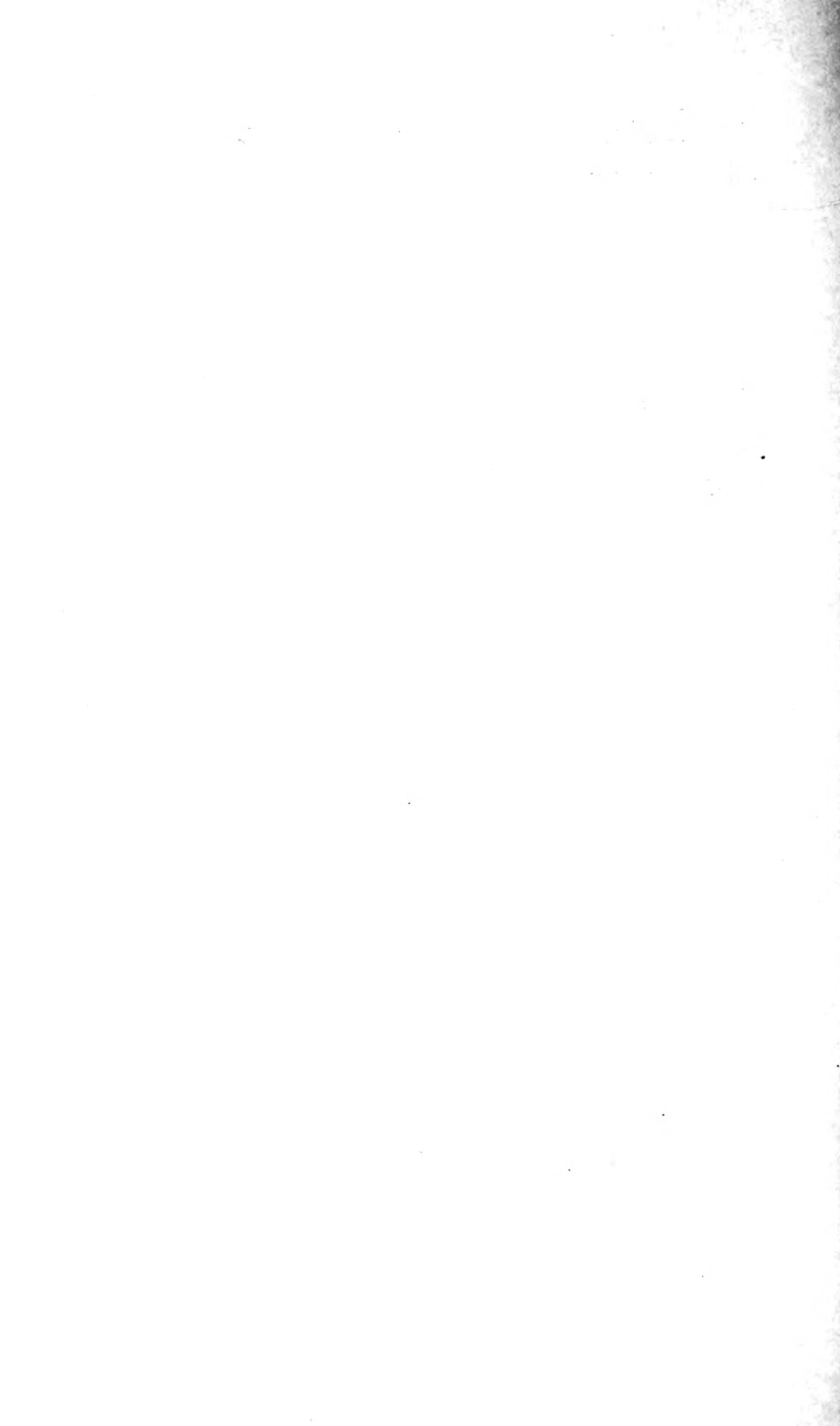
3. The Board's Order is wholly valid and proper under the Act.

NATIONAL LABOR RELATIONS
BOARD,

By ERNEST A. GROSS,
Associate General Counsel.

Dated at Washington, D. C., this 23rd day of
April 1942.

[Endorsed]: Filed Apr. 27, 1942. Paul P. O'Brien,
Clerk.



No. 10118

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCHAEFER-HITCHCOCK COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT B. WATTS,

General Counsel,

ERNEST A. GROSS,

Associate General Counsel,

GERHARD P. VAN ARKEL,

Assistant General Counsel,

MORRIS P. GLUSHIEN,

DAVID FINDLING,

WILLIAM T. WHITSETT,

Attorneys,

National Labor Relations Board.

FILED

JUL 3 - 1942

PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10118

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCHAEFER-HITCHCOCK COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case comes before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U.S.C., Title 29, Sec. 151, *et seq.*). This Court has jurisdiction under Section 10 (e) of the Act; respondent, an Idaho corporation, maintains its principal office and operates a plant in the State of Idaho, within this judicial circuit, where the unfair labor practices occurred.

STATEMENT OF THE CASE

Upon proceedings pursuant to Section 10 of the Act,¹ the Board, on March 12, 1942, issued its findings of fact,

¹These, initiated by charges filed by Lumber and Sawmill Workers Union, Local No. 2614, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the

conclusions of law, and order (39 N. L. R. B., No. 135; R. 25-46), which may be briefly summarized as follows:

1. *Nature of respondent's business* (R. 29).—Respondent is principally engaged at plants in the States of Idaho and Minnesota in the manufacture and processing of wooden poles. All of the 105,800 gallons of creosote and approximately 10 percent of the 21,680 poles used annually at its Priest River, Idaho, plant, involved in this proceeding, are shipped to that plant from out-of-State sources, and 85 percent of the poles handled or processed there, valued at approximately \$148,000, are sold and shipped to out-of-State points.²

2. *The unfair labor practices* (R. 30-42).—Respondent, by sponsoring and participating through supervisory employees in a meeting of its employees called to discuss their unionization, by antiunion statements and conduct of its supervisory employees, and by discharging Clifford Damschen because of his union activities, engaged in unfair labor practices violative of Section 8 (1) and (3) of the Act.

3. *The Board's order* (R. 43-46).—The Board ordered respondent to cease and desist from the unfair

American Federation of Labor (herein called the Union), included complaint of the Board (R. 1-5), answer of respondent (R. 5-11), hearing before a trial examiner (R. 57-257), proposed findings of fact, proposed conclusions of law, and proposed order of the Board (R. 27-28), exceptions thereto by respondent and brief in support of such exceptions (R. 11-24, 28), and opportunity for oral argument before the Board.

² Upon these undisputed facts (Bd. Exh. 2; R. 63-64; R. 1-2, 5), the jurisdiction of the Board is clear. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601.

labor practices found, to reinstate Damschen with back pay, and to post appropriate notices.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

II. The Board's order is valid and proper.

ARGUMENT

POINT I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act

A. Preliminary statement

The evidence in this case is, in almost all important respects, substantially uncontradicted. As we shall show, it overwhelmingly supports the Board's findings that immediately following the initiation by an employee, Clifford Damschen, of a movement to unionize respondent's employees at its Priest River, Idaho, plant, respondent, in violation of the Act, "sought to counteract Damschen's efforts to interest the employees in union organization and to discourage the employees from exercising their rights under the Act" (R. 35). Thus, the Board found that respondent's supervisory employees, in violation of Section 8 (1), engaged in activities and conduct and made statements which interfered with, restrained, and discouraged the adherence

of the employees to the Union. When Damschen, despite this, continued his efforts to organize the employees, he was summarily discharged in violation of Section 8 (3) and (1).

B. Respondent's violations of Section 8 (1)

Union activities began at respondent's Priest River plant in February 1941, when Damschen, an employee there, after broaching unionization to several other workers, invited a Union organizer to visit the plant (R. 67-69, 94-95). An organizer came to the plant on February 10 and saw Damschen, who then joined the Union and made plans with the organizer for an organizational meeting of the employees to be held at a local public hall the following evening (R. 69-71, 97). Damschen publicized the meeting that day and the next day by personally speaking to a majority of his 25 or 26 fellow workers and urging them to attend (R. 70-71, 74, 97).

Respondent, acting through Superintendent Conlee and Supervisor Wear,³ lost no time in interfering with and opposing the Union movement. On February 11, the very day the first meeting of the Union was to be held, Wear engaged an employee in conversation concerning unions, asked the employee what he thought of the desirability of a union, and suggested that "it was better to let [a union] alone" until respondent's president, Schaefer, "could advise us to join a union,

³ Conlee was the highest ranking official in charge of the plant and there is no question as to his supervisory status (R. 205, 235, 241). While respondent does challenge Wear's supervisory status, its responsibility for his antiunion conduct is perfectly clear, as we point out below, pp. 10-11.

and what union" (R. 138-140, 143-145). That night only Damschen and two others of respondent's employees attended the Union meeting (R. 97). It was agreed, however, to hold another organizational meeting on February 19 (R. 98-99, 71). This meeting was also publicized by Damschen (*ibid.*).

Supervisor Wear now decided, with two other employees,⁴ to hold a countermeeting of the employees on February 15 for the asserted purpose of discussing the question of unionization without the presence of a Union organizer (R. 178-179). Wear assisted in making arrangements for the meeting and urged employees to attend it (R. 72-73, 99-100, 140, 153-154, 162-163, 167, 169, 178, 207, 219). Occurrences at the meeting show that its underlying purpose was to discourage the employees from adherence to the Union and to impress upon them the supposed advantages of individual, over collective, dealings with their employer.

The meeting was attended by Superintendent Conlee, Supervisor Wear, and about 20 of respondent's 25 or 26 employees (R. 74, 101, 141, 149, 165, 170).⁵ Wear

⁴ One of these was George Cronkright, an inspector, who had been working for respondent for 17 years (R. 152-154). His wage rate was the same as that of Wear, and exceeded that of any other employee in the yard except Superintendent Conlee (R. 252-254). His duties required him, as Conlee testified, to "kind of oversee the work the others are doing," to inspect poles, and to direct the work of the hauling teams, who were "more or less under his direction" (R. 237).

⁵ Superintendent Conlee testified that he knew the purpose of the meeting, "to find out what the views of the employees were with reference to a union" (R. 219), and therefore "kind of hesitated" to go; nevertheless, he attended because Wear and others "kind of urged me and said it would be a good thing if I went up there, that they would like to have me" (R. 207-208).

introduced Conlee to the gathering and declared that Conlee had "had some good experience with unions back east and I believe * * * can tell us a whole lot about them" (R. 74, 102-103, 141, 179-181).¹ Conlee thereupon delivered an anti-union diatribe, telling the assembly, according to Damschen's uncontradicted testimony,² that he believed everything was "going rosy in the yard"; that he thought they "were getting along swell"; that if any employee had any grievances they "could come" to Conlee who would himself correct the difficulty or take the matter up with Company officials; that he had had "experience" with "unions back east"; that the unions had called strikes as a result of which the men "lost much more" than they had gained; and that unions "can call you out on strike any time they want to and tax you on your dues" (R. 75, 103). At this point in Conlee's discourse, Damschen, who was present, declared that it was his understanding that members of each local union had a right to vote among themselves to determine whether they were to be taxed or to go on strike (R. 75). Conlee replied, "Yes, but

¹ Conlee had previously been superintendent of respondent's Minneapolis plant when the employees there had engaged in strikes in 1935 or 1936 and again in 1938 (R. 209, 218-219).

² There was no substantial contradiction between the testimony in this regard of Damschen and that of the several witnesses called by respondent (R. 157, 171, 197, 209-211, 220-221). Conlee not only did not deny the foregoing version of his remarks at the meeting but when asked on direct examination by respondent's counsel what his "version of what transpired at that meeting" was, replied that "it is a good deal as has been testified here" (R. 208). We discuss below (pp. 9-10) the significance of the alleged fact, testified to by several of respondent's witnesses, that Conlee's remarks may have been prefaced by the statement that respondent was not "opposed to union labor" (R. 157, 171, 197, 203, 209).

they tell you how to vote" (*ibid.*). When Damschen then protested that a Union organizer ought to be present to give the employees the Union's viewpoint and "make it a two-sided discussion" (R. 75, 105, 141-142), Conlee retorted, "That would not be a two-sided discussion. Them fellows have answers for every question you ask. They can paint some beautiful pictures, but I never seen one developed" (*ibid.*).

During the meeting, Damschen made his militant pro-Union attitude even clearer by declaring that he, and he believed other employees as well, were dissatisfied with their wages; by announcing that a Union organizer would be present in Priest River on February 19; and by successfully opposing a suggestion for an immediate vote among the employees on the question of unionization, on the ground that the men had not had an opportunity to hear a Union organizer and thus learn "both sides of the story" (R. 76-77, 142, 147-148, 171).

Following the events described, Damschen was the only one of respondent's employees who dared appear at the Union's meeting on February 19 (R. 106-107). Supervisor Wear thereafter again declared to Damschen, according to Damschen's uncontradicted testimony, that the employees "had been getting along pretty well and he hated to see a union come in and break us up," and assured Damschen, who complained concerning his wages, that "we can straighten things out without a union" (R. 78). Nevertheless, Damschen continued to urge the employees to join the Union until he was discriminatorily discharged about 4 weeks later (R. 106-107, *infra*, pp. 13-17).

Upon the foregoing facts, substantially uncontroverted in all essential respects, the Board properly concluded (R. 35, 43) that respondent had violated Section 8 (1) of the Act. Respondent's sponsorship and participation, through Superintendent Conlee and Supervisor Wear, in the meeting of February 15, for the avowed purpose of discussing unionization of the employees without the presence of a Union organizer (*supra*, p. 5), was itself a flagrant breach of the Act, which reserves matters of self-organization exclusively to the employees.⁸ In addition, Conlee's declaration at the meeting that things were "going rosy" in the absence of any union; his suggestion that the employees submit their grievances to him directly; his disparagement of unions as organizations which call strikes and levy assessments without regard to the desires of their members, and which mislead their members through glowing pictures which never materialize—all these declarations, delivered by the highest official in the plant, were plainly calculated to impress upon the employees that respondent did not want them to join the Union or bargain other than individually, that their best interests lay in continued reliance upon their employer's unilateral generosity, and that adherence to the Union would result in financial cost to them without compensating benefits. Such disparagement of unions and discouragement of collective organization constitute

⁸ E. g., *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 80; *National Labor Relations Board v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 787-788 (C. C. A. 9); *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9), cert. denied, 312 U. S. 678.

a well-recognized form of interference, restraint, and coercion.⁹ Similarly, Supervisor Wear's suggestion that the employees ought not join a labor organization until respondent's president approved and selected one, his declaration to Damschen that the employees were getting along well and he "hated" to see a union "break us up," and his asserted belief that Damschen's wages could be satisfactorily adjusted without the assistance of a union (*supra*, pp. 4-5, 7) were, as the Board found (R. 35), plainly calculated, in light of all the circumstances, "to make clear to the employees that the respondent did not desire that its employees join the Union." Respondent thus further intruded unlawfully upon the organizational activities of its employees.¹

Respondent has urged various defenses in a hopeless effort to avert the authority of the cited and other cases, establishing the propriety of the Board's findings of Section 8 (1) violation. None of the defenses has merit.

The alleged fact that Conlee's statements at the meeting of February 15 may have been accompanied by a declaration that respondent was not opposed to unionization of the employees (see note 7, p. 6, *supra*), did not, as respondent suggests, negative their coercive effects upon the employees or dissipate the restraining effects of Conlee's presence. In the light of what ac-

⁹ E. g., *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 518-520; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 592-596; *National Labor Relations Board v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 783, 787-788 (C. C. A. 9); the *Sunshine Mining* case, *supra*.

¹⁰ E. g., the *Machinists* case, 311 U. S., at 78; the *Pacific Gas & Electric* case, 118 F. (2d) at 783, 787-788.

accompanied it, Conlee's statement of neutrality, if made, must necessarily have been understood by the audience of employees as mere lip-service to the principle of employee freedom of choice. In any event, it is settled that it was for the Board to appraise the effect of the statements in light of the whole record and the totality of respondent's conduct. *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469. The Board's finding that even if Conlee's antiunion harangue was prefaced by a declaration of neutrality, "that would not vitiate the effect of his open attack on the Union and unions generally" (R. 34, note 3), was entirely reasonable, hence conclusive.

Respondent's claim that Wear's antiunion activities were improperly attributed to it by the Board because, as respondent asserts, he was not a supervisory employee, is also without merit. Wear admittedly had been in complete charge of the plant for several months prior to Conlee's coming there in 1939, he took Conlee's place when Conlee was absent from the yard at various times, and he regularly transmitted Conlee's orders to the employees as to their work (R. 72, 137-138, 173-177, 188, 206). Conlee admitted that Wear had authority to recommend hiring and discharge (R. 206), and the employees' testimony at the hearing shows that they recognized and understood that Wear was a "straw-boss" (R. 72, 137). In these circumstances Wear plainly enjoyed a supervisory status sufficient under the controlling decisions to establish employer liability under the Act. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 79-80;

National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 599; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 520-521; *National Labor Relations Board v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 787 (C. C. A. 9).

Nor is it material, as respondent contends, that Conlee and Wear, in their antiunion conduct and utterances, may have acted beyond the scope of their authority and contrary to respondent's desires or instructions. It is settled that, regardless of respondent's responsibility for their interference on principles of *respondent superior*, respondent was, in view of the supervisory status of these men, "within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if [it] had directed them." The *Heinz* case, *supra*, at p. 521; the *Pacific Gas & Electric Co.* case, *supra*, at pp. 787-788; *Swift & Co. v. National Labor Relations Board*, 106 F. (2d) 87, 93 (C. C. A. 10); *Consumers Power Co. v. National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6).

Respondent's further claim that the statements and activities of Conlee and Wear were protected by the First Amendment to the Constitution also requires little comment. The right of free speech does not, of course, include the right to coerce employees, through speech or otherwise, and even expressions of opinion by an employer may be of such nature as to coerce and intimidate employees in violation of the Act. *National Labor Relations Board v. Virginia Electric & Power*

Co., 314 U. S. 469, 477; *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 786, (C. C. A. 9), cert. denied 312 U. S. 678; *National Labor Relations Board v. Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2); *National Labor Relations Board v. Chicago Apparatus Co.*, 116 F. (2d) 753, 756-757 (C. C. A. 7). Here respondent's assistance in the instigation of, and its participation in, the meeting of its employees on February 15, at a time when the employees were engaged in their first tentative efforts toward collective action, and the unambiguous antiunion statements of its highest plant official at that meeting, advocating individual dealing, disparaging unions, and warning the men against collective bargaining, were more than mere expressions of opinion. Viewed in their setting, there can be no doubt that the holding of the meeting and Conlee's remarks at the meeting were designed, as the Board found (R. 35), to counteract Damschen's efforts on behalf of the Union and to discourage the adherence of the employees to that organization, a flagrant interference with employee rights of free choice. So, too, Wear's antiunion statements (*supra*, pp. 4-5, 7), considered, as they were by the Board (R. 35), in the light of the meeting of February 15 and the "totality of the Company's activities during the period in question" (*National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 477), were clearly coercive and not mere expressions of opinion. Respondent's reliance upon the First Amendment is no more than a transparent attempt to escape the consequences of this plainly coercive conduct, con-

duct which includes acts as well as speeches. The First Amendment affords no such shield.¹¹

C. The discriminatory discharge of Damschen, in violation of Section 8 (3) and (1)

We have already described Damschen's initiative and leadership in the movement to organize respondent's employees (*supra*, pp. 4-5, 6-7). It was he who invited the Union to seek members at respondent's plant, and he was the only one of respondent's employees to join the Union thereafter and to engage in activities on its behalf. He made his pronunion attitude clear not only by his persistent union activities among the general body of employees but by his outspoken opposition to the antiunion activities of Conlee and Wear in connection with the meeting of February 15, 1941. He was the only one of respondent's employees subsequently to attend the union meeting on February 19. Despite respondent's opposition and the apparent lack of success of Damschen's efforts, he continued his pronunion activities among the employees

¹¹ Since the decision in *National Labor Relations Board v. Virginia Electric & Power Co.*, *supra*, employers in three cases have sought certiorari contending, as here, that the First Amendment protected antiunion statements made by them, and urging that the lower courts had therefore improperly enforced the Board's findings of Section 8 (1) violation; in each case certiorari was denied by the Supreme Court. *Norristown Box Co. v. National Labor Relations Board*, 124 F. (2d) 429 (C. C. A. 3), certiorari denied (No. 993, October Term, 1941) April 13, 1942; *North Electric Mfg. Co. v. National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied (No. 931, October Term, 1941) March 16, 1942; *National Labor Relations Board v. Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied (No. 1256, October Term, 1941) June 8, 1942.

thereafter until, on March 19, he was summarily discharged (R. 79-80, 107-108). Conlee gave him no detailed explanation, merely stating, "We are cutting down the force. We won't be needing you any more" (R. 79, 108).

Immediately following his dismissal, Damschen informed Union President Butler of the matter (R. 83), and on March 22, Butler and another union representative, Paddock, called at the plant with Damschen to protest the dismissal and seek his reinstatement (R. 84, 124-125). They first saw Superintendent Conlee, who declared in answer to Paddock's question, that Damschen had been let go because "they were reducing" the force. Paddock then asked when Damschen would be recalled, to which Conlee replied, "We are not going to put him back on the job." When Paddock inquired why, Conlee answered curtly, "That is none of your damn business" (R. 124-127). Later the same day, Butler, Paddock, and Damschen saw President Schaefer. The reason which Schaefer assigned for Damschen's dismissal was not the same as that which Conlee had offered. Schaefer asserted that Damschen had been discharged because he was "rough on the machinery," that Schaefer had "caught" Damschen "jerking the tractor," and that he had therefore ordered Conlee to dismiss him (R. 84-85, 109). Schaefer also declared, according to Damschen's undenied testimony, that he had heard that Damschen was dissatisfied with his wages and "By God, if a man ain't satisfied there, he can quit" (R. 85). Schaefer's explanation was further inconsistent with Conlee's testimony at the hearing to the effect that Damschen's work had been "quite

satisfactory," that he had "nothing particularly" against Damschen, and that he had discharged Damschen *without* consultation or prior discussion of the matter with Schaefer or anyone else (R. 221, 224-225); and with the undisputed fact that Damschen had never received any criticism of his work (R. 86-87).

At the time of his dismissal, Damschen had been regularly employed by respondent at its Priest River plant for about 6 years (R. 67-68, 89-90). At least since Superintendent Conlee's coming to the plant in 1939, he had admittedly never previously been laid off except when the entire yard was either completely or almost completely shut down (R. 68, 226). Yet he was the only employee released on or about March 19 (R. 114, 226). The dismissal was further contrary to respondent's usual practice in that respondent usually gave preference to employees who, like Damschen, had worked for it for 2 years or more (R. 88, 110, 113-114, 116-118, 119-120); nevertheless it now released Damschen although he had greater seniority than a majority of the employees, some of whom had but recently been hired by respondent (R. 82-83, 225). It is also significant that Damschen was never thereafter recalled to work despite the facts that his work had been "quite satisfactory," as Conlee himself admitted (R. 221, 86-87), and that respondent subsequently needed men to do precisely the same work as Damschen had been doing at the time of his discharge or other work which he had also performed on occasion (R. 66-67, 97-98, 111, 182-183, 214-215, 228, 233). Instead, respondent hired many new employees, increasing its staff 2 months later by about 35 men (R. 74, 97-98, 215, 223, 233-234).

Before the Board, Conlee testified, as respondent maintained, that Damschen was in fact dismissed on March 19 solely because one of the three tractors then used at the plant was discontinued (R. 212, 214-215, 221). He then admitted, however, that the tractor which was discontinued was not the one operated by Damschen (R. 222), and that another tractor had been available to which no one was regularly assigned (R. 226-227). He was then asked why Damschen was not assigned to this tractor, and replied, "Well, I just did not want Damschen, I guess was the reason" (R. 227). He proceeded to admit, further, that within 2 weeks after March 19 respondent replaced the discontinued tractor with a new one (R. 227-228), and that new men were subsequently hired for tractor work in place of Damschen (R. 228, 182-183). His testimony then continued as follows (R. 228-230):

Q. Why didn't you rehire Damschen?

A. Well, Mr. Damschen never came to me for re-employment.

Q. Well, you knew that he had requested re-employment on the 22nd day of March, did you not? [See p. 14, *supra*.]

A. Yes.

Q. Then why didn't you notify him? You knew where Damschen lived?

A. Yes, sir.

Q. You knew Damschen had worked for the company for a number of years?

A. Yes, sir.

Q. Do you have any other explanation for not offering him re-employment?

A. None further than the statement I made a little while ago that I just did not want him any more.

Q. Isn't it true, Mr. Conlee, that one reason and the principal reason that you did not offer Damschen employment when business picked up was because he had taken this matter up with the union?

A. I don't think that that was a particular reason. I think it may have had some bearing on it.

Q. Well, that was one of the reasons, wasn't it?

A. Not the particular reason; no.

Q. Well, was it a reason?

A. I would not say it was a reason.

Q. The only reason that you can offer then is that you just did not want him?

A. Yes, sir.

Q. You did not like Damschen?

A. Oh, I had nothing particularly against him.

Q. You just did not want him to work for you?

A. Just did not want him to work for me.

Q. And yet his work was quite satisfactory?

A. Yes, quite.

Upon this state of the record, the Board's finding that Damschen was discharged because of his union membership and activities was plainly mandatory. Elaboration upon the propriety of the finding in light of the evidence above reviewed would, we feel, be but an imposition on this Court.

POINT II

The Board's order is valid and proper

The Board's order (R. 43-46) requires respondent to cease and desist its unfair labor practices, to reinstate

Damschen with back pay, and to post appropriate notices. Such provisions are the usual and judicially approved remedial measures upon findings of violations of Sections 8 (1) and 8 (3) of the Act. The provision of the order, restraining respondent from "in any other manner" interfering with, restraining, or coercing its employees' exercise of the rights guaranteed in Section 7 of the Act is also proper. Such a provision was recently enforced by the Supreme Court upon findings of violations of Sections 8 (1) and 8 (3) in *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 62 S. Ct. 960, enforcing 26 N. L. R. B. 1182, 1235; *National Labor Relations Board v. Electric Vacuum Cleaner Co.*, 62 S. Ct. 846, enforcing 18 N. L. R. B. 591, 640; and *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, enforcing in this respect 19 N. L. R. B. 547, 603. See also, *National Labor Relations Board v. Air Associates, Inc.*, 121 F. (2d) 586, 592 (C. C. A. 2); *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 662 (C. C. A. 2); *National Labor Relations Board v. Entwistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4); *American Smelting & Refining Co. v. National Labor Relations Board*, 10 L. R. R. 492, 493 (C. C. A. 5), decided May 27, 1942; *National Labor Relations Board v. Bersted Mfg. Co.*, 10 L. R. R. 516, June 6, 1942 (C. C. A. 6), amending 124 F. (2d) 409; *National Labor Relations Board v. Newberry Lumber and Chemical Co.*, 123 F. (2d) 831 (C. C. A. 6); *Wilson & Co. v. National Labor Relations Board*, 124 F. (2d) 845, 848 (C. C. A. 7). Cf. also, *National Labor Relations Board v. Hollywood-Maxwell Co.*, 126 F. (2d) 815, 819 (C. C. A. 9); *National Labor*

Relations Board v. Pacific Gas & Electric Co., 118 F. (2d) 780, 789-791 (C. C. A. 9).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid, and that a decree should issue enforcing the order in full.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
GERHARD P. VAN ARKEL,
Assistant General Counsel,
MORRIS P. GLUSHIEN,
DAVID FINDLING,
WILLIAM T. WHITSETT,
Attorneys,
National Labor Relations Board.

JUNE 1942.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V, Sec. 15 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SCHAEFER-HITCHCOCK COMPANY,
Respondent.

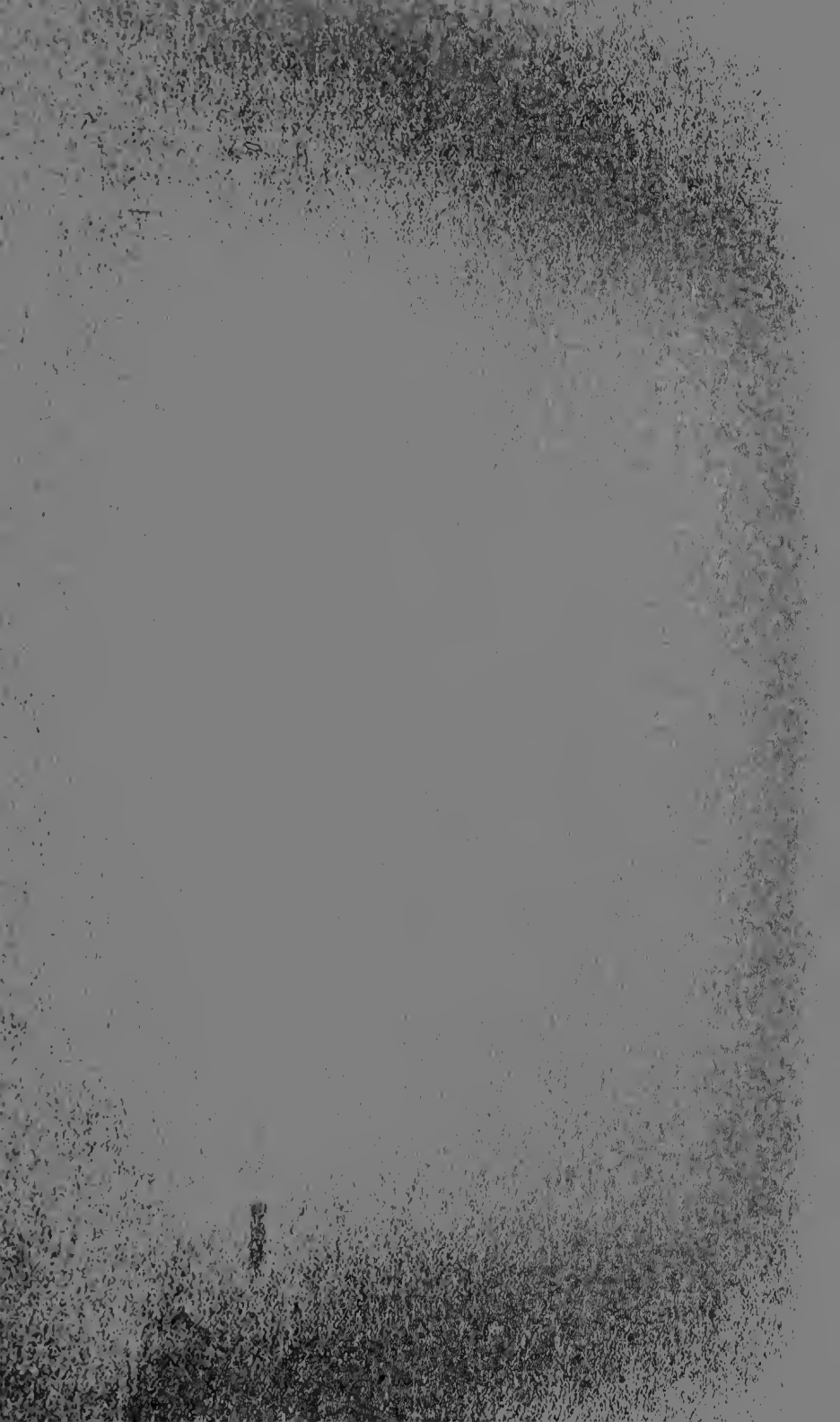
ON PETITION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT
SCHAEFER-HITCHCOCK COMPANY

C. H. POTTS,
Attorney for Respondent.

FILED
JUL 20 1942

PAUL P. O'BRIEN
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SCHAEFER-HITCHCOCK COMPANY

C. H. POTTS,
Attorney for Respondent.

JURISDICTION

Respondent does not question the jurisdiction of this Court. The allegation in the Petition for Enforcement that "this Court therefore has jurisdiction of the Petition by virtue of Section 10 (e) of the National Labor Relations Act" (R. 47), is admitted by Respondent in its answer to the petition by failure to deny said allegation (R. 52).

STATEMENT OF THE CASE

The complaint contained two charges of unfair labor practices as follows:

First. That Respondent, by its officers, agents and certain employees, caused, instructed and encouraged the holding of a meeting of its employees at which antiunion statements were made, thereby interfering with its employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8 (1) of the Act (R. 3-4).

Second. That Respondent discharged an employee, Clifford Damschen, because of his union activities, and has refused to reinstate him, and by said discharge and refusal discriminated in regard to his hire and tenure of employment, and has discouraged and is discouraging membership in the Union in violation of Section 8 (3) of the Act. (R. 2-3).

The Board found that Respondent, by instigating and holding said meeting of its employees, by statements made by a foreman during this meeting, and by other statements of employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 35), and concluded that such interference was an unfair labor practice within the meaning of Section 8 (1) of the Act (R. 43).

The Board further found that Respondent, by discharging said employee, Clifford Damschen, on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 41), and concluded that by discriminating in regard to the hire and tenure of employment of Clifford Damschen, thereby discouraging membership in the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act (R. 43).

Respondent has contended throughout the proceedings and now contends that the alleged unfair labor practices charged in the Complaint were not sustained by substantial evidence (R. 13-14-18), and that the Findings of unfair labor

practices are not supported by substantial evidence (R. 53-54).

THE MEETING OF THE EMPLOYEES:

The origin of the meeting of the employees on February 15, 1941, was disclosed in the testimony of one of the employees of respondent, George Willard Cronkright, a pole inspector, who testified as follows (R. 153-155):

Q. Do you recall a meeting of some kind which was held in Priest River on February 15, 1941, by the employees of the Schaefer-Hitchcock pole plant?

A. Yes, sir.

Q. Did you have anything to do with arranging that meeting?

A. I did.

Q. Just what did you do?

A. Well, nothing more than to try and get the boys together and talk the proposition over.

Q. Did you discuss it with anyone else and take some part in arranging the meeting or getting them together?

A. Well, I and Con Wear got them together.

Q. Do you know of anybody else participating in the preliminaries?

A. Ed Gillespie, I believe.

Q. How did you go about getting them together?

A. Well, just told them we would gather up at the Peterson Hotel and would talk the proposition over.

Q. Well, did you take that up with any of

- the crew or individually?
- A. Oh, not individually; just around throughout the yard, whoever happened to be working with me.

Q. Now, did Mr. Conlee make any suggestion to you about having such a meeting?

A. No, sir.

Q. Did he talk to you about it at all?

A. No, sir.

Q. Or did you talk to him about it?

A. I asked him to come up there.

Q. Oh, you asked him to come up?

A. I did.

Q. What did he say?

A. He said that he did not know: I told him I thought it would be pretty nice for him to come up there and sit in, that he would see how the boys felt.

Q. Did he finally say whether he would or would not?

A. I don't remember whether he told me he would come or not.

Q. However, when the meeting was held he did come?

A. Yes.

On Cross Examination this witness testified as follows (R. 164-165):

Q. Can you tell me how long it was prior to the date of this meeting that you first got the idea that it would be a good idea to get the boys together to discuss it?

A. Only a few days, four or five days.

Q. And Con Wear was the first man you talked to, wasn't it?

A. No, I think Ed Gillespie was the first one I talked with.

Q. You and Con Wear were together making most of the arrangements, weren't you?

A. No, we weren't.

Q. Who assisted you besides Con Wear in making the arrangements?

A. What arrangements do you mean?

Q. The arrangements for the meeting.

A. We just went around to the men we were working with, and while I asked one man that man might turn around and ask another,—understand?

Q. Yes, but you and Con Wear agreed that that was the way to do it?

A. Yes.

The employee Con Wear, a witness for respondent, testified as follows: (R. 169)

Q. Mr. Wear, when did you first hear of the proposition to have this meeting?

A. I don't know whether it was two or three days or three or four days before the meeting.

Q. From whom did you hear about it?

A. George Cronkright, and I believe, Ed Gillespie.

Q. Do you recall just how it came about, as to who first mentioned it or what the circumstances were?

A. No, I can't.

Q. What did you do about it in the way of communicating with others of your fellow workmen there?

A. I believe Mr. Cronkright spoke to several of them and —

Q. Did you tell any of them?

A. I don't remember who I asked. I think I asked certain ones. I asked John Webb if he was going to attend, and he said he did not know if he would or not, and it probably would not amount to anything anyway.

Q. Had you had any conversation with Mr. P. J. Conlee, the foreman, in regard to this meeting at any time before it was held?

A. I did not.

Q. Had he ever suggested to you that there be such a meeting?

A. He had not.

Q. Or had anybody connected with the Schaefer-Hitchcock Company?

A. No, sir.

On Cross Examination this witness testified as follows: (R. 178-179):

Q. Was this February 15 meeting your idea?

A. No, it was not my idea.

Q. I beg your pardon?

A. It wasn't my idea alone.

Q. It was yours and whose else?

A. George Cronkright and Ed Gillespie.

Q. Did you mention it to Cronkright first, or did he mention it to you?

A. I don't know whether it was George Cronkright who mentioned it first, or whether it was I.

Q. You did not start talking about this meeting until you heard there was some talk among the employees of joining a union, did you?

A. I never heard of any talk among the

employees about the union.

Q. Did you hear there was some talk among the employees about a union and that some union organizers had been in town?

A. There had been union organizers in town.

Q. And it was after you heard that that you started this talk about the February 15 meeting?

A. That I started the talk?

Q. Put it this way, it was after you heard the union organizer was in town that you and George Cronkright started talking about the meeting?

A. That is right.

Patrick J. Conlee, the plant foreman, a witness for respondent, testified as follows: (R. 207-208):

Q. Mr. Conlee, it is in evidence that you attended a meeting of the employees held in Priest River on February 15, 1941. How did you happen to attend this meeting?

A. Well, I was invited by Mr. Cronkright and I think Mr. Wear and Mr. Ed Gillespie, who was there at the time. They invited me to attend this meeting.

Q. Did you have anything to do with the calling or holding of that meeting?

A. No, sir.

Q. Did you know it was to be called or held until you were told or invited to come by those gentlemen?

A. No, sir, that was my first intimation of it.

Q. And when was that intimation or invitation given to you?

A. Well, it was just about noon or just before

quitting time; not more than an hour before quitting time.

Q. At noon on Saturday?

A. Yes.

Q. What was your response to them? What did you say?

A. Well, I kind of hesitated. I said I did not think I ought to attend the meeting. They kind of urged me and said it would be a good thing if I went up there, that they would like to have me.

Clifford Damschen, the principal witness for the Board, testified that on February 15th, 1941, he was invited by Con Wear to attend a meeting of the employees of respondent (R. 72), that Con Wear spoke to him on February 15 with reference to the meeting on the main street in Priest River with no one else present, saying: "Clif, we are going to have a little meeting at the Peterson Hotel at 4 o'clock and I would like to have you attend. We are going to discuss this union thing and decide whether to join a union or not". That he asked Wear who was going to be there to represent the union and Wear said this wasn't going to be that kind of a meeting . . . it was just going to be a friendly chat among the workers to see what they thought about unions, that Damschen told Wear he did not believe that would be a very appropriate meeting without someone to discuss the union because none of the boys really know what a

union was and suggested having an organizer there to tell what the union was and that Wear said, "Well, you can have your union men if you want them, but this is just going to be a friendly chat among the workers". (R. 73).

John Webb, the other witness for the Board, testified that he was invited to attend the meeting of the employees by Con Wear, who told him that they were going to have a meeting at the Peterson Hotel to decide whether or not they would have a union, and he would like to have him attend, and that Webb told Wear he had quite a bit of work he was doing around home and felt that there wouldn't be anything said there that would be of sufficient interest for him to come (R. 140-141).

What actually happened at this meeting on February 15, 1941, was disclosed in the testimony of Clifford Damschen and John Webb as witnesses for the Board, and by George Willard Cronkright, Con Wear, Charles E. Leobold, R. E. McKee, and Patrick J. Conlee witnesses for respondent.

According to the testimony of Damschen, approximately 21 of the 26 employees at the plant were present at the meeting (R. 74), and after waiting until a majority of the crew had arrived, Ed Gillespie said, "Well, let's get this thing over with and find out what we are going

to do''. Damschen then asked Ed Gillespie who was going to do the talking and Con Wear stated, 'Well, our foreman Mr. Conlee, is here with us. He has had some good experience with unions back East, and I believe he can tell us a whole lot about them'. (R. 74). Mr. Conlee was the general foreman in charge of the pole yard (R. 74).

After Wear had made the statement about Conlee, Mr. Conlee started to speak and said, "Boys, as far as I can see, everything has been going rosy in the yard. I thought we were getting along swell. And I believe if any of you fellows have any troubles to be settled you could come to me, and if I can't do anything for you, I will go higher. I have had experience with unions back East, they went out on strike and lost much more than they gained by their strike. They can call you out on strike any time they want to and tax you on your dues".

Damschen interrupted Conlee at this point and said he understood that men in the local had the right to vote as to whether they were taxed or went out on strike and Conlee said, "Yes, but they tell you how to vote".

Damschen then suggested that there were several who did not understand what the union was, and that they should have an organizer or someone there to defend the union and make it a two-

sided discussion. Conlee then said, "That would not be a two-sided discussion. Them fellows have answers for every question you ask. They can paint some beautiful pictures, but I never seen one develop". (R. 75).

After this exchange of remarks, Damschen went on to tell the fellows he thought there were several that really were not satisfied with wages and working conditions and also mentioned his own wages. Conlee asked him where they paid any more for his type of work and he told Conlee at the Newport yard or most any place that they used tractors, and mentioned the fact that a union organizer would be in the following Wednesday and they could have a two-sided meeting. One of the workers suggested taking a vote and getting it over with and Damschen said they could not vote intelligently unless they heard both sides of the story. No vote was taken at the meeting. (R. 76-77).

On Cross Examination this witness testified that Mr. Conlee made a statement that he was not there representing the Company (R. 103), and then testified as follows (R. 104):

- Q. He did not say any man would lose his job if he joined the union, did he?
- A. He did not.
- Q. He did not say that the employees ought not to join the union, did he?
- A. Not in them words, no.

Q. Did he say that the Schaefer-Hitchcock Company would close its plant if the employees joined the union?

A. No.

Q. Did he say that the company would curtail operations if the employees joined the union?

A. He did not.

Q. He did not make any threats at all, did he?

A. No.

After the foreman Conlee had finished several employees gave sketches of their opinion of unions. Everything that was said was not in favor of the union (R. 105).

Several of the witnesses testified that the first thing the foreman said at the meeting was to the effect that the Company was not opposed to union labor or to organized labor. (R. 157-171-197-209).

THE DISCHARGE OF CLIFFORD DAMSCHEN:

Patrick J. Conlee, the foreman of the plant, a witness for respondent, testified that he discharged this employee on March 19, 1941. (R. 211); that he made the decision himself without consultation with anyone else (R. 221); and that he hadn't discussed the question of laying Damschen off with Mr. Schaefer, the president of the Company (R. 225). He further testified that the reason he discharged Damschen was because one tractor was laid off and that he did not dis-

charge him because of union activity or because of his membership in a union (R. 213). His testimony in this respect was as follows: (R. 212-213):

Q. Why did you discharge Mr. Damschen from the employment of the Company on March 19, 1941?

A. Well, we laid off one tractor. We were about to lay off one tractor, and Mr. Damschen was chosen as the man to go.

Q. You decided to lay him off instead of others?

A. Yes, sir.

Q. Was your decision to lay him off influenced by reason of any union activity on his part?

A. No, sir, I did not know that he was active.

Q. Was it influenced by anything that occurred at this meeting on February 15, 1941?

A. No, sir.

Q. Did you lay him off or discharge him because of union activity?

A. No, sir.

Q. Or because of his membership in a union?

A. No, sir.

SUMMARY OF ARGUMENT.

1. The finding of the Board that the respondent, by the statements of Con Wear to Webb on February 11, by instigating and holding a meeting on February 15, by the statements of Conlee during this meeting, and by the statements of Con Wear to Damschen about a week

thereafter, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 35) is not supported by substantial evidence, and denies to respondent and to its employees the freedom of speech guaranteed by the First Amendment to the Constitution of the United States.

2. The finding of the Board that the respondent, by discharging Clifford Damschen on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 41) is not supported by substantial evidence.

ARGUMENT.

POINT I.

THE MEETING OF THE EMPLOYEES.

The testimony of the witnesses relating to the calling and holding of the meeting of the employees on Feby. 15, 1941, has been quoted extensively to demonstrate that neither the charges or findings with respect to this meeting are supported by substantial evidence. Instead of showing that the meeting was "instigated" by Respondent, the evidence conclusively establishes that the meeting was the result of spontaneous action on the part of some of the employees. The finding that the meeting was "in-

stigated'' by respondent is based on mere assumption, without any proof to support it. The Board assumed that everything these employees did was prompted, suggested or influenced by respondent, and that respondent caused the employees to call and hold the meeting to stop any movement to organize the plant. This assumption was indulged in in spite of the undisputed testimony that two employees, Cronkright and Gillespie, were just as active in arranging for the meeting as was the employee, Con Wear, who is also assumed to have been some kind of a foreman, and that neither the foreman, or any officers or representatives of respondent had any prior knowledge of the meeting.

This state of the record presents questions of grave importance: Have employees the right to oppose the unionizing of a plant, as well as to favor it? Are the statements and actions of employees opposing organization to be charged against the employer as unfair labor practices?

Respondent contends that the employees had the undoubted right as American citizens to take steps to oppose the unionizing of the plant, if they saw fit to do so; that in exercising this right they were not violating any provision of the Act, or any law; and that their actions and statements cannot properly be charged against the employer as interference.

Certainly the statements or actions of employees, even those in a minor supervisory capacity, could not be held to represent the policy of an employer unless it is first shown that the employer had a policy with which such statements and actions were in harmony. In this case there is nothing to indicate any policy on the part of respondent antagonistic to labor unions, or that its officers were opposed to labor unions, or to its employees joining unions. On the contrary, the president of respondent testified that he had been a member of a labor union, and that he was not opposed to labor unions.

The views expressed by the foreman at this informal meeting, which had no chairman, secretary, or other officer, were very moderate, and are unjustly characterized as a "diatribe" in the Board's Brief. He did not show antagonism toward labor unions in general, or toward this union in particular. The testimony of the Board's witness, Damschen, as to the statements made by the foreman at the meeting did not even come close to proving the charge that "at which time the aforesaid officers, agents and employees advised respondent's employees that no benefit would be derived from membership in the union, that respondent's employees should not join the union, that respondent would close its plant or curtail operations if the employees joined or were active in the union, and made other state-

ments derogative to the union.” According to the testimony of several witnesses (quoted above) he expressly stated that the company was not opposed to union labor, and Damschen admitted that he stated he was not there representing the company. (R. 103).

In expressing his opinion on the question of the benefits to be derived from the union, the foreman acted within his rights. Such an expression of opinion is within the protection of the First Amendment to the Constitution of the United States.

“Neither the Act nor the Board’s Order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made.”

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 477.

This is the last word of the Supreme Court on this subject, and firmly establishes the principle that mere expressions of opinion on labor policies by an employer, or those held to be his representatives, do not violate the Act. As stated by the Court in the opinion: “The employer in this case is as free now as ever to take any side it may choose on this controversial issue”. Here, there was no “course of conduct” amounting to restraint or coercion. There were no other activities of the employer to make the opinions ex-

pressed by the foreman and other employees "amount in connection with other circumstances to coercion within the meaning of the Act". On cross-examination, the Board's witness, Damschen, admitted (R. 104) that the foreman did not make any threats at all, and specifically, that he did not say that the employees should not join the union, or that respondent would close its plant or curtail operations if the employees joined the union, as charged in the complaint. (R. 3)

POINT 2.

THE DISCHARGE OF CLIFFORD DAMSCHEN.

This employee was discharged by the foreman, Conlee, on March 19, 1941, of his own volition, and without consultation with anyone else (R. 211-221). The foreman was sworn and examined as a witness, and testified under oath, that the reason he discharged Damschen was because one tractor was laid off, and he decided to lay him off instead of others (R. 212). He further testified that he did not discharge him because of union activity, or because of his membership in a union (R. 213).

The testimony of the foreman was not contradicted by any witness, or in any manner, and he was not impeached. He was the only person who knew the real cause of discharge. His testi-

mony cannot be disregarded on mere suspicion that he was not telling the truth.

National Labor Relations Board v. Union Mfg. Co., 124 Fed. (2d) 332;

National Labor Relations Board v. Tex-O-Ken, etc., Company, 122 Fed. (2d) 433;

Martel Mills Corporation v. National Labor Relations Board, 114 Fed. (2d) 624-631;

Bussman Mfg. Co. v. National Labor Relations Board, 111 Fed. (2d) 783-787;

Nevada Consolidated Copper Corporation v. National Labor Relations Board, 122 Fed. (2d) 587,

(Reversed by Supreme Court on ground that the findings of fact of the Board were not without support in the evidence.)

National Labor Relations Board v. Nevada Consolidated Copper Corporation, 62 S. Ct. 960)

The evidence concerning the discharge of Damschen was insufficient to constitute an unfair labor practice under Sec. 8 (3) of the Act, because of the absence of proof that the discharge was for the purpose, or had the effect, of encouraging or discouraging membership in a labor organization.

U. S. C. A. Title 29, Sec. 158 (3)
(Sec. 8 (3) National Labor Relations Act).
Stonewall Cotton Mills, Inc. v. National Labor Relations Board, —Fed. (2d)
—, decided June 3, 1942 by U. S. Circuit Court of Appeals, Fifth Circuit (Not yet reported)

In the above case the Court stated in the opinion:

“An employee, though he belongs to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason prohibited by the Act. It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity. To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review.”

Stonewall Cotton Mills, Inc. v. National Labor Relations Board, *supra*

Citing N. L. R. B. v. Air Associates, 121 Fed. (2d) @ 592.

That the discharge of Damschen on March 19, did not have the effect of discouraging membership in the union is apparent from the attitude of the employees. Damschen testified that at the meeting of the employees held on February 15 “several gave short sketches of their opinion of unions, all not in favor of the union. Everything that was said was not in favor of the union”. (R. 105), and that at the union meeting on Wednesday following the employees meeting “no one from the yard except myself showed up” (R. 107). Not a single employee showed up although they had all been

invited. (R. 107). The effort to unionize the plant had completely collapsed more than a month before his discharge, because of the opposition of the employees. The foreman did not know that Damschen had become a member of the union: that anything had been done toward organizing a union at the plant during that period: or that Damschen had been active in the union at the time he discharged him.

R. 212 His testimony to this effect was not disputed. Damschen admitted that he took no further action toward holding meetings, but claimed only that he "went on talking union".

(R. 107) There is no evidence that Conlee had knowledge of such "talking", or that it influenced him in making his decision.

CONCLUSION

The controlling findings of the Board are not based on substantial evidence, but on mere suspicion and conjecture. The order is therefore invalid, and should not be enforced.

Respectfully submitted,

C. H. Potts,

Attorney for Respondent.

APPENDIX

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

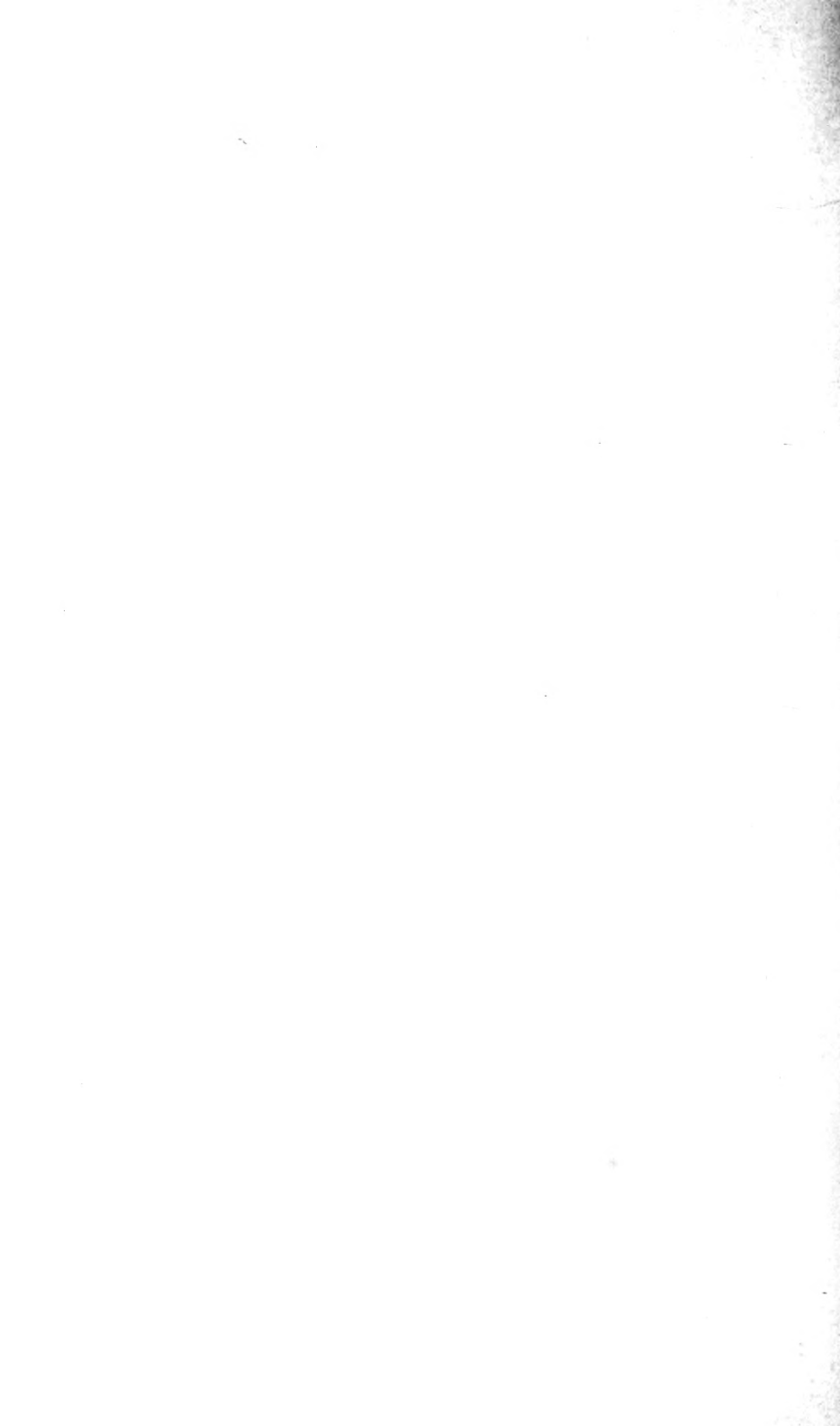
ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SEC. 8 (3), NATIONAL LABOR RELATIONS ACT. U. S. C. A. TITLE 29, SEC. 158 (3).

It shall be unfair labor practice for an employer—

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *****



No. 10118

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCHAEFER-HITCHCOCK COMPANY, RESPONDENT

**UPON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT B. WATTS,

General Counsel,

ERNEST A. GROSS,

Associate General Counsel,

GERHARD P. VAN ARKEL,

Assistant General Counsel,

DAVID FINDLING,

WILLIAM T. WHITSETT,

Attorneys,

National Labor Relations Board.

FILED

AUG 17 1942

PAUL P. O'BRIEN,

CLERK

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(1)



In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10118

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCHAEFER-HITCHCOCK COMPANY, RESPONDENT

*UPON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent contends (Br., pp. 20-22) that the Board's finding of violation of Section 8 (3) of the Act with respect to the discharge of Damschen is improper "because of the absence of proof that the discharge * * * had the effect, of encouraging or discouraging membership" in the Union.¹ The Board expressly found (R. 41), without independent testimony as to the discouraging effect of the dismissal, that Damschen's discharge because of his union membership and activities discouraged membership in the Union. Respondent's complaint apparently is that the Board *inferred* that respondent's antiunion discrimination against

¹ Respondent also challenges the substantiality of the evidence in support of the Board's finding that the basis of respondent's discharge of Damschen was his union membership and activities. We have fully answered this contention in our main brief at pp. 13-17, and therefore do not reargue it here.

Damschen discouraged union membership. Its argument presumably is that, in order to establish a violation of Section 8 (3) of the Act, the Board was required to establish such discouraging effect by independent testimony.

It is the Board's view that the discharge of an employee because of union membership *ipso facto* violates the Act without independent testimony as to its effect, because such discrimination *inevitably and as a matter of course* "discourage[s] membership in any labor organization," in flat violation of the prohibition of Section 8 (3). Certainly it discourages the union membership of the discharged employee to whom the discharge has brought home the fact that he can adhere to a union only at the cost of his means of livelihood. Necessarily it also discourages union membership on the part of the other employees to whom the discriminatory discharge is a warning that if they remain union members their turn may come next.

The propriety of this view is established beyond question by the decisions of the Supreme Court construing Section 8 (3). That Court has in a great many cases and without exception upheld Board findings of violation of Section 8 (3) simply upon supported findings of discrimination such as are present in the instant case and despite a complete absence of testimony that the discrimination actually affected union membership or activities. E. g., *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 129; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 255; *National Labor Relations Board v. Link-*

Belt Co., 311 U. S. 584, 589, 598, 600, 603; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 181, 183, 185, 187. All of the Circuit Courts of Appeals, including this Court, have followed this correct practice in hundreds of cases. While the practice is so commonplace that citation of cases seems unnecessary, we may refer the Court to its decisions in *National Labor Relations Board v. National Motor Bearing Co.*, 105 F. (2d) 652, 658-659; *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. (2d) 488, 493-494, cert. denied, 306 U. S. 643; *North Whittier Heights Citrus Assn. v. National Labor Relations Board*, 109 F. (2d) 76, 82, cert. denied 310 U. S. 632; *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 792, cert. denied 312 U. S. 678. The only Circuit Court of Appeals in which a contrary view has ever been expressed (*Stonewall Cotton Mills, Inc., v. National Labor Relations Board*, 10 L. R. R. 514 (C. C. A. 5)), upon which respondent relies (Br., pp. 20-21), modified its position on the Board's petition for rehearing (10 L. R. R. 663, decided July 6, 1942).

National Labor Relations Board v. Air Associates, Inc., 121 F. (2d) 586 (C. C. A. 2), which respondent also cites (Br., p. 21), is not to the contrary. That case involved five discharges. Of these, three (Seifert, Werner, and Thompson) were of the conventional type, involving dismissals because of the union activities of the employees in question, precisely like Damschen's dismissal in the instant case. Upon findings (20 N. L. R. B. 356, 376-388) that these three employees

were discharged because of their union activities, the Board concluded, exactly as here and without any direct testimony as to the actual effect of the discharges, that the employer had discouraged union membership by discrimination, in violation of Section 8 (3) of the Act (20 N. L. R. B., at 380, 384, 388, 390). The Second Circuit enforced the Board's findings and order in this regard without any discussion of or reference to the necessity of direct testimony of actual discouraging effect (121 F. (2d), at 591-592).

Two of the discharges in the *Air Associates* case (Rodolitz and Geoghegan) presented a unique fact situation in that, as the Board found (20 N. L. R. B., at 371-375), these men were discharged, not because they were members of or active in the union—indeed the Board did not find that their union membership was even known to the employer (*ibid.*, p. 375)—but because the employer desired to create resentment against the union by unnecessarily discharging ordinary employees, thus counteracting the effect of the union's success in securing the reinstatement of four union shop committeemen who had been previously discharged by him. The Board found that these discharges, also, constituted discrimination discouraging union membership, in violation of Section 8 (3) (20 N. L. R. B., 375, 390). In denying enforcement of the Board's order in this regard the Second Circuit declared that the employer's conduct did not violate Section 8 (3) because the Court could "discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had

the effect required by the Act [that is, discouraging union membership], or findings from which such an effect might reasonably be inferred" [italics supplied]. This statement was explained in a very recent decision in which the Second Circuit again sustained Board findings that discharges for union membership and activities violated Section 8 (3) without any testimony that such discrimination actually affected union membership or activities (*National Labor Relations Board v. Cities Service Oil Co.*, 10 L. R. R. 656, decided July 2, 1942). In this case the Court (in an opinion written by the same judge who wrote the *Air Associates* opinion) explained the unusual "setting" in the *Air Associates* case which had prompted this statement; it pointed out that in that case, "left unaided by the Board's expert knowledge of the subject," it could find no "rational basis" for concluding that an employer's conduct in telling nonunion men that they must be dismissed to make room for union men would "necessarily" tend to discourage union membership. And the Court explicitly announced that the statement in the *Air Associates* case "should be read in its factual context and, accordingly, should be very narrowly limited."

Hence the *Air Associates* case is not authority for respondent, but rather for the Board (see *supra*, p. 2), in a case such as the present, involving a conventional discharge because of union membership and activities.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that the order should be enforced.

Respectfully submitted.

ROBERT B. WATTS,

General Counsel,

ERNEST A. GROSS,

Associate General Counsel,

GERHARD P. VAN ARKEL,

Assistant General Counsel,

DAVID FINDLING,

WILLIAM T. WHITSETT,

Attorneys,

National Labor Relations Board.

AUGUST 1942.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE WASHINGTON WATER POWER COM-
PANY, a corporation, THE CITY BANK
FARMERS TRUST COMPANY, a corpora-
tion, and RALPH E. MORTON, as Trustee,
vs. Appellants,

UNITED STATES OF AMERICA,
And Appellee.

UNITED STATES OF AMERICA,
vs. Appellant,

THE WASHINGTON WATER POWER COM-
PANY, a corporation, THE CITY BANK
FARMERS TRUST COMPANY, a corpora-
tion, and RALPH E. MORTON, as Trustee,
Appellees.

Transcript of Record

Upon Appeals from the District Court of the United
States for the Eastern District of Washington,
Northern Division.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,
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And Appellee.

UNITED STATES OF AMERICA,
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THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,
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Upon Appeals from the District Court of the United
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

EDWARD M. CONNELLY,
United States Attorney
332 Post Office Building, Spokane, Washington

B. E. STOUTEMYER,
Bureau of Reclamation
603 Post Office Building, Portland, Oregon
Attorneys for Petitioner.

POST, RUSSELL, DAVIS & PAINE,
Spokane & Eastern Building, Spokane, Wash-
ington

H. E. T. HERMAN,
Columbia Building, Spokane, Washington
Attorneys for Defendant Washington
Water Power Company et al.

OSSEE W. NOBLE,
Prosecuting Attorney,
Republic, Washington
Attorney for Defendant Ferry County

F. LEO GRINSTAD,
Prosecuting Attorney,
Colville, Washington
Attorney for Stevens County

In the District Court of the United States for the
Eastern District of Washington,
Northern Division

No. 52

UNITED STATES OF AMERICA,
Petitioner,
vs.

THE WASHINGTON WATER POWER COMPANY, corporation; ROBERT L. THOMPSON and JANE DOE THOMPSON, his wife; CENTRAL UNION TRUST COMPANY OF NEW YORK, a corporation, Trustee; CENTRAL HANOVER BANK AND TRUST COMPANY, a corporation; FRANK WOLFE, as Trustee; CITY BANK FARMERS TRUST COMPANY, a corporation, RALPH E. MORTON as Trustee; THE FARMERS' LOAN AND TRUST COMPANY, a corporation, as Trustee; CHINOOK LUMBER AND MANUFACTURING COMPANY, a corporation (formerly Hedlund Lumber and Manufacturing Company, a corporation); PAUL W. HARRIS, Trustee in Bankruptcy of the Chinook Lumber and Manufacturing Company, a corporation; FRANK DONLEY and JANE DOE DONLEY, his wife; GEORGE TURNER and JANE DOE TURNER, his wife; and GEORGE TURNER, Trustee; HELEN P. LOOMIS and FRED LOOMIS, her husband; HARLIN I. PEYTON and RUTH A. PEY-

TON, his wife; HORACE C. PEYTON and JANE DOE PEYTON, his wife; VICTOR A. PEYTON and JOHN DOE, her husband; the Unknown Heirs of I. N. Peyton, deceased; L. C. JESSEPH and JANE DOE JESSEPH, his wife; the Unknown Heirs of Gus Carlson deceased; COLUMBIA IRRIGATION DISTRICT, a quasi municipal corporation; ELIZABETH HUMMEL and JOHN DOE, her husband; WESLEY HUMMEL and JANE DOE HUMMEL, his wife; LILLIAN C. HUMMEL and JOHN DOE, her husband; ROSE M. HUMMEL and JOHN DOE, her husband; the Unknown Heirs of Phillip Hummel, deceased; WILLIAM H. REID and JANE DOE REID, his wife; FERRY COUNTY, WASHINGTON; STEVENS COUNTY WASHINGTON; the Unknown Heirs of any of the above-named defendants, if deceased, and ALL OTHER PERSONS, FIRMS or CORPORATIONS, UNKNOWN, having or claiming to have any right, title, estate, lien or interest in or to the land described below or any portion thereof;

Defendants.

PETITION FOR CONDEMNATION

Comes now the petitioner, United States of America, by the undersigned attorneys acting under and by direction of the Attorney [1*] General of the

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States, and for its cause of action against the above-named defendants alleges:

I.

That the defendant The Washington Water Power Company is a corporation duly organized under the laws of the State of Washington.

II.

That the defendants Robert L. Thompson and Jane Doe Thompson (whose true Christian name is to the petitioner unknown) are husband and wife.

III.

That the defendant Central Union Trust Company of New York, Trustee, is a corporation duly organized under the laws of the State of New York.

IV.

That the defendant Central Hanover Bank and Trust Company is a corporation duly organized under the laws of the State of New York.

V.

That the defendant City Bank Farmers Trust Company is a corporation duly organized under the laws of the State of New York.

VI.

That the defendant The Farmers' Loan and Trust Company is a corporation duly organized under the laws of the State of New York.

VII.

That the defendant Chinook Lumber and Manufacturing Company (formerly Hedlund Lumber and Manufacturing Company) is a corporation duly organized under the laws of the State of Washington; that said corporation has been duly adjudicated bankrupt by the United States District Court for the Eastern District of Washington, Northern Division, and that defendant Paul W. Harris is the duly appointed, qualified and acting trustee in bankruptcy of said corporation. [2]

VIII.

That the defendants Frank Donley and Jane Doe Donley (whose true Christian name is to the petitioner unknown) are husband and wife.

IX.

That the defendants George Turner and Jane Doe Turner (whose true Christian name is to the petitioner unknown) are husband and wife.

X.

That the defendants Helen P. Loomis and Fred Loomis are wife and husband.

XI.

That the defendants Harlin I. Peyton and Ruth A. Peyton are husband and wife.

XII.

That the defendants Horace C. Peyton and Jane Doe Peyton (whose true Christian name is to the petitioner unknown) are husband and wife.

XIII.

That the defendants Victor A. Peyton and John Doe (whose true Christian name is to the petitioner unknown) are husband and wife.

XIV.

That the defendants L. C. Jesseph and Jane Doe Jesseph (whose true Christian name is to the petitioner unknown) are husband and wife.

XV.

That the defendants Elizabeth Hummel and John Doe (whose true Christian name is to the petitioner unknown) are wife and husband.

XVI.

That the defendants Wesley Hummel and Jane Doe Hummel (whose true Christian name is to the petitioner unknown) are husband and wife. [3]

XVII.

That the defendants Lillian C. Hummel and John Doe (whose true Christian name is to the petitioner unknown) are wife and husband.

XVIII.

That the defendants Rose M. Hummel and John Doe (whose true Christian name is to the petitioner unknown) are wife and husband.

XIX.

That the defendants William H. Reid and Jane Doe Reid (whose true Christian name is to the petitioner unknown) are husband and wife.

XX.

That the defendant Columbia Irrigation District is a quasi municipal corporation organized under the laws of the State of Washington.

XXI.

That the defendant Ferry County, Washington, is a municipal corporation and political subdivision of the State of Washington.

XXII.

That the defendant Stevens County, Washington, is a municipal corporation and political subdivision of the State of Washington.

XXIII.

That pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388) commonly known and referred to as the Reclamation Law, and of the Act of Congress of August 30, 1935 (49 Stat. 1039), which authorized in section 2 thereof the construction of Grand Coulee Dam on the Columbia River for the purpose of improving navigation, controlling floods, regulating the flow of the Columbia River, providing for storage, and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian reservations, and other beneficial uses, and for the generation of electric energy as a means of financing, aiding and assisting such undertaking and incidental works necessary to [4] such project, and by virtue of this authority the Secretary of the Interior of the United States of America has

caused surveys and investigations to be made of the Columbia Basin Project on the Columbia River, a Federal project having for its purpose, among other things:

(a) Improvement of navigation and flood control by storage of flood water at high water stages of the river, and release of stored water at periods of low water;

(b) Irrigation of arid lands including public lands of the United States;

(c) Generation of electric energy as incidental to the other purposes above mentioned for the purpose of aiding in the payment of the cost of the project works;

all in pursuance of the Federal Constitution and Laws of the United States of America.

XXIV.

That acting in pursuance of said laws and with the aid of said investigations and surveys, the Secretary of the Interior as such officer has determined upon the construction of Grand Coulee Dam as the initial unit of said project, and the same has been specifically authorized by Congress in the said Act of August 30, 1935 (49 Stat. 1039).

XXV.

That in pursuance of the provisions of the said Act of August 30, 1935 (49 Stat. 1039) and the said Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, the Secre-

tary of the Interior as such officer has let contracts for the construction of said Grand Coulee Dam and Reservoir and appurtenant structures and by reason of said acts and the appropriation bills passed by the United States Congress in pursuance thereof, there is available a sum of money to construct said dam and acquire the necessary rights of way, lands and other property needed therefor and in connection therewith and the Secretary of the Interior has authorized such [5] construction and right of way acquisition.

XXVI.

That the petitioner in good faith intends to construct said dam and reservoir and the same are now in actual course of construction.

XXVII.

That the hereinafter described land situate in Ferry and Stevens counties in the Eastern District of Washington is necessary for the said reservoir and for the construction of said dam and appurtenant structures, to-wit:

Tract No. 1

(The Washington Water Power Company
tract)

The following described property situate in the County of Stevens, State of Washington, to-wit:

Lot one (1) in the northeast quarter (NE¹/₄),
Lot two (2) in the northeast quarter (NE¹/₄).

and lot three (3) in the southeast quarter ($SE\frac{1}{4}$) of Section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian (patented under date of July 22, 1896 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus) being islands in the Columbia River, containing 88.85 acres, more or less.

Also, Lot one (1), the north half of Lot two ($N\frac{1}{2}$ of Lot 2), the north half of the southeast quarter of the northwest quarter ($N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$) and the northeast quarter of the northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section twelve (12), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, containing 93.00 acres, more or less.

Also, a tract of land containing 21.14 acres, more or less, being that portion of Lot one (1) and the southwest quarter of the northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$) of section fourteen (14), and that portion of Lots one (1) and two (2) and the southeast quarter of the southeast quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section eleven (11) (patented under date of June 8, 1891 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus), all in Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, lying between the east line of the Columbia River and a line described as follows: Beginning at a point on the west line of the south-

west quarter of the northeast quarter ($SW\frac{1}{4}$ NE $\frac{1}{4}$) of said Section fourteen (14), which point bears North $02^{\circ}54'10''$ west 1070.85 feet and south $87^{\circ}57'49''$ West 2630.26 feet from the quarter section corner on east line of said Section Fourteen (14); running thence North $05^{\circ}35'00''$ East 207.92 feet; thence North $36^{\circ}13'00''$ East 476.48 feet; thence North $07^{\circ}55'20''$ East 517.39 feet; thence North $00^{\circ}01'00''$ East 296.85 feet; thence North $11^{\circ}31'40''$ [6] East 220.19 feet; to a point on the north line of said Section fourteen (14), which point bears South $87^{\circ}59'45''$ West 2141.46 feet from the northeast section corner of said section fourteen (14); thence North $11^{\circ}31'40''$ East 184.15 feet; thence north $27^{\circ}35'10''$ east 241.46 feet; thence North $44^{\circ}34'50''$ East 285.64 feet; thence North $11^{\circ}38'10''$ West 583.14 feet; thence south $77^{\circ}21'40''$ East 335.03 feet; thence North $52^{\circ}09'20''$ east 291.35 feet; thence North $60^{\circ}55'10''$ East 338.99 feet; thence North $37^{\circ}37'10''$ East 303.06 feet; thence North $23^{\circ}43'20''$ East 456.88 feet; thence South $67^{\circ}15'00''$ east 333.86 feet; thence South $47^{\circ}22'10''$ East 305.19 feet; thence south $38^{\circ}01'00''$ East 160.95 feet to a point on the east line of said Section eleven (11), which point bears North $02^{\circ}01'13''$ West 1561.06 feet from the southeast section corner of said Section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes

known as the Inland Empire Highway).

Also, Lot two (2) of Section fourteen (14), Township thirty-six (36) north, range thirty-seven (37) east, Willamette Meridian, excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway), containing 13.80 acres, more or less.

Also, a tract of land containing 79.43 acres, more or less, being all of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of section twelve (12), and a portion of the southwest quarter of the southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$) of section twelve (12) and the Northwest quarter of the Northwest quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), all in Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the north line of the southwest quarter of the southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$ of said Section twelve (12), which point bears north $02^{\circ}01'13''$ West 1320.00 feet and North $85^{\circ}30'05''$ East 108.45 feet from the southwest corner of said Section twelve (12); running thence north $85^{\circ}30'05''$ east 2417.99 feet to the northeast corner of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of said section twelve (12); thence South $01^{\circ}37'15''$ East 1313.28 feet to the quarter section corner on the south line of said Section twelve (12);

thence south $85^{\circ}20'21''$ west 1262.15 feet along the south line of said section twelve (12) to the southwest corner of the southeast quarter of the southwest quarter ($SE\frac{1}{4}\frac{1}{4}SW\frac{1}{4}$) of said section twelve (12); thence south $03^{\circ}10'19''$ east 1185.64 feet along the east line of the northwest quarter of the northwest quarter ($NW\frac{1}{4}\frac{1}{4}NW\frac{1}{4}$) of said Section thirteen (13); thence north $30^{\circ}16'40''$ West 70.25 feet; thence North $54^{\circ}17'10''$ West 416.42 feet; thence North $34^{\circ}18'20''$ West 472.22 feet; thence North $29^{\circ}05'20''$ West 240.05 feet; thence North $13^{\circ}13'50''$ East 234.53 feet to a point on the north line of said Section thirteen (13), which point bears North $85^{\circ}20'21''$ East 622.95 feet from the northwest section corner of said section thirteen (13); thence north $13^{\circ}13'50''$ east 74.75 feet; thence North $21^{\circ}36'20''$ west 264.07 feet; thence North $41^{\circ}24'20''$ West 197.32 feet; thence North $28^{\circ}20'00''$ West 219.54 feet; [7] thence North $21^{\circ}36'00''$ West 664.16 feet to the point of beginning.

The following described property situate in the County of Ferry, State of Washington, to-wit:

A tract of land containing 34.09 acres, more or less, being that portion of Lot two (2), Lot five (5) (formerly known as Lot 1) and Lot six (6) (formerly known as Lot 3), of section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, between the west line of the Columbia

River and a line described as follows: Commencing at a point on the south line of Lot six (6) (formerly known as Lot 3) of said Section eleven (11), which point bears south $02^{\circ}08'00''$ East 1320.68 feet and North $87^{\circ}56'06''$ East 1977.31 feet from the quarter section corner on the west line of said section eleven (11); running thence North $05^{\circ}26'30''$ East 493.38 feet; thence North $23^{\circ}37'40''$ east 511.06 feet; thence south $44^{\circ}39'00''$ East 309.36 feet; thence north $03^{\circ}30'50''$ East 255.82 feet; thence North $10^{\circ}53'10''$ West 376.77 feet; thence north $01^{\circ}36'10''$ east 250.34 feet; thence North $38^{\circ}35'00''$ east 371.59 feet; thence south $04^{\circ}28'10''$ east 608.63 feet; thence north $12^{\circ}48'20''$ East 461.47 feet; thence North $02^{\circ}12'10''$ East 375.15 feet; thence North $63^{\circ}18'10''$ West 269.31 feet; thence North $01^{\circ}32'00''$ east 628.77 feet; thence North $08^{\circ}59'50''$ east 619.09 feet; thence North $27^{\circ}46'00''$ West 217.77 feet; thence South $81^{\circ}55'20''$ East 228.43 feet; thence North $32^{\circ}15'00''$ East 383.24 feet; thence North $56^{\circ}35'40''$ east 64.33 feet to a point on the north line of said section eleven (11), which point bears north $87^{\circ}44'41''$ east 621.57 feet from the quarter section corner on the north line of said section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated October 30, 1928, as set forth in Book 5 of Miscellaneous Deeds, at page 111, of the records of Ferry County, Washington, to erect, construct, reconstruct, and maintain a gaging station together with the necessary steel tower, anchors, cables, guys and appurtenances over, along and across Lot six (6) of section twenty-two (22), Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian;

Also, that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated September 21, 1934, as set forth in Book 5 of Miscellaneous Records, at page 299 of the records of Ferry County, Washington, to erect, construct, reconstruct and maintain a gaging station together with the necessary appurtenances over, along and across Lot three (3) of section twenty-two (22), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian. [8]

Tract No. 2

(Hummel Tract)

Also the following described property situate in the County of Stevens, State of Washington, to-wit:

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter

of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North $86^{\circ}09'57''$ east 2568.16 feet and North $03^{\circ}38'34''$ West 247.27 feet from the quarter section corner on the west line of said Section thirteen (13); running thence North $64^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet; thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13) to the point of beginning.

XXVIII.

That the fee simple title to the land herein described as Tract No. 1 stands on the records of Ferry and Stevens Counties, Washington, in the

name of The Washington Water Power Company, a corporation, which company is in possession of the same; that defendants Robert L. Thompson and Jane Doe Thompson, his wife; Central Union Trust Company of New York, a corporation, Trustee; Central Hanover Bank and Trust Company, a corporation, Frank Wolfe as Trustee; City Bank Farmers Trust Company, a corporation; Ralph E. Morton as Trustee; The Farmers' Loan and Trust Company, a corporation, as Trustee; Chinook Lumber and Manufacturing Company, a corporation (formerly Hedlund Lumber and Manufacturing Company, a corporation); Paul W. Harris, Trustee in Bankruptcy of the Chinook Lumber and Manufacturing Company, a corporation; Frank Donley and Jane Doe Donley, his wife; George Turner and Jane Doe Turner, his wife, and George Turner, Trustee; [9] Helen P. Loomis and Fred Loomis, her husband; Harlin I. Peyton and Ruth A. Peyton, his wife; Horace C. Peyton and Jane Doe Peyton, his wife, Victor A. Peyton and John Doe, her husband, and the Unknown Heirs of I. N. Peyton, deceased; L. C. Jesseph and Jane Doe Jesseph, his wife; the Unknown Heirs of Gus Carlson, deceased; Columbia Irrigation District, a quasi municipal corporation; William H. Reid and Jane Doe Reid, his wife; Ferry County, Washington; Stevens County, Washington; the Unknown Heirs of any of the above-named defendants, if deceased; and all other persons, firms, or corporations, unknown, having or claiming to have any right, title, estate, lien

or interest in or to the land described above as Tract No. 1, or any portion thereof, claim some interest therein, the exact nature and amount whereof is unknown to the petitioner.

XXIX.

That the fee simple title to the land herein described as Tract No. 2 stands on the records of Stevens County, Washington, in the name of Phillip Hummel, who is now deceased; that the defendants Elizabeth Hummel and John Doe, her husband; Wesley Hummel and Jane Doe Hummel, his wife; Lillian C. Hummel and John Doe, her husband; Rose M. Hummel and John Doe, her husband, are the known heirs of Phillip Hummel, deceased; that the Unknown Heirs of Phillip Hummel, deceased; William H. Reid and Jane Doe Reid, his wife; The Washington Water Power Company, a corporation; Central Hanover Bank and Trust Company, a corporation; Frank Wolfe, as Trustee; City Bank Farmers Trust Company, a corporation; Ralph E. Morton, Trustee; The Farmers' Loan and Trust Company, a corporation, Trustee; Helen P. Loomis and Fred Loomis, her husband; Harlin I. Peyton and Ruth A. Peyton, his wife; Horace C. Peyton and Jane Doe Peyton, his wife; Victor A. Peyton and John Doe, her husband, the Unknown Heirs of I. N. Peyton, deceased; Stevens County, Washington; the Unknown Heirs of any of the above-named defendants, if deceased; and all other persons, firms or corporations, unknown,

having or claiming to have any right, title, [10] estate, lien or interest, in or to the land described above as Tract No. 2 or any portion thereof, claim some interest therein, the exact nature and amount whereof is unknown to the petitioner.

XXX.

That the petitioner has in good faith undertaken to purchase said tracts of land without avail, the petitioner and the defendants being in disagreement as to the market value thereof, and the petitioner does now in good faith continue its offer to purchase said land at a fair market value.

Wherefore, petitioner prays that it be adjudged that the public use requires the condemnation of said land and that this Court proceed to determine the interest of the defendants therein and that title in fee simple be decreed to the petitioner, upon its paying into Court the reasonable value thereof.

SAM M. DRIVER,

United States Attorney.

LYLE KEITH,

Assistant United States
Attorney.

B. E. STOUTEMYER,

District Counsel, Bureau of
Reclamation.

HART SNYDER,

Special Attorney, Department
of Justice,
Attorneys for Petitioner.

United States of America,
Eastern District of Washington—ss.

Sam M. Driver, being first duly sworn, upon oath deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the Eastern District of Washington, and as such makes this verification; that he has read the foregoing Petition for Condemnation, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

SAM M. DRIVER

Subscribed and sworn to before me this 9th day of December, 1939.

EVA M. HARDIN,

Deputy Clerk, United States
District Court for the East-
ern District of Washington.

(Seal)

[Endorsed]: Filed Dec. 9, 1939. A. A. LaFramboise, Clerk. [11]

[Title of District Court and Cause.]

DECLARATION OF TAKING

I, John W. Finch, Acting Under Secretary of the Interior of the United States of America, acting in such capacity and by virtue of provisions of (a) The Act of Congress of August 30, 1935 (49 Stat., 1039), (b) the Act of Congress of June 17, 1902 (32 Stat., 388) and all acts amendatory thereof

or supplementary thereto, commonly known as the Reclamation Law, and (c) the Act of Congress of February 26, 1931 (46 Stat., 1421), Chapter 307, do hereby make and file this declaration of taking pursuant to the provisions of said Act of February 26, 1931 and declare that the fee simple title to the land described in the petition filed in this cause is hereby taken for the use of the United States and under the authority of and for the purposes set forth in said acts; that the estate in said lands hereby taken for the public use aforesaid is an estate in fee simple absolute; that the total value of said land including all buildings, structures, and improvements thereon is Eight thousand one hundred ninety-one and 70/100.....Dollars (\$8,191.70) which said sum is hereby deposited into the registry of this Honorable Court to the use and for the benefit of the ones entitled thereto, said sum being allocated to the tracts involved as follows:

Tract No. 1 (The Washington Water Power Company tract)—330.31 acres—\$7,950.35

Tract No. 2 (Hummel tract)—21.27 acres—\$241.35

That the following is a description of the lands to which fee simple absolute title is taken under this declaration with the estimated value of the same:

Tract No. 1

(The Washington Water Power Company
tract)

The following described property situate in the County of Stevens, State of Washington, to-wit:

Lot one (1) in the northeast quarter ($NE\frac{1}{4}$), Lot two (2) in the northeast [12] quarter ($NE\frac{1}{4}$), and lot three (3) in the southeast quarter ($SE\frac{1}{4}$) of Section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian (patented under date of July 22, 1896 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus) being islands in the Columbia River, containing 88.85 acres, more or less.

Also, Lot one (1), the north half of Lot two ($N\frac{1}{2}$ of Lot 2), the north half of the southeast quarter of the northwest quarter ($N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$) and the northeast quarter of the northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section twelve (12), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, containing 93.00 acres, more or less.

Also, a tract of land containing 21.14 acres, more or less, being that portion of Lot one (1) and the southwest quarter of the northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$) of section fourteen (14), and that portion of Lots one (1) and two (2) and the southeast quarter of the southeast quar-

ter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section eleven (11) (patented under date of June 8, 1891 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus), all in Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, lying between the east line of the Columbia River and a line described as follows: Beginning at a point on the west line of the southwest quarter of the northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) of said Section fourteen (14), which point bears North 02°54'10" west 1070.85 feet and south 87°57'49" West 2630.26 feet from the quarter section corner on east line of said Section Fourteen (14); running thence North 05°35'00" East 207.92 feet; thence North 36°13'00" East 476.48 feet; thence North 07°55'20" East 517.39 feet; thence North 00°01'00" East 296.85 feet; thence North 11°31'40" East 220.19 feet; to a point on the north line of said Section fourteen (14), which point bears South 87°59'45" West 2141.46 feet from the northeast section corner of said section fourteen (14); thence North 11°31'40" East 184.15 feet; thence north 27°35'10" east 241.46 feet; thence North 44°34'50" East 285.64 feet; thence North 11°38'10" West 583.14 feet; thence south 77°21'40" East 335.03 feet; thence North 52°09'20" east 291.35 feet; thence North 60°55'10" East 338.99 feet; thence North 37°37'10" East 303.06 feet; thence North 23°43'20" East 456.88 feet; thence South

67°15'00" east 333.86 feet; thence South 47°22'10" East 305.19 feet; thence south 38°01'00" East 160.95 feet to a point on the east line of said Section eleven (11), which point bears North 02°01'13" West 1561.06 feet from the southeast section corner of said Section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also, Lot two (2) of Section fourteen (14), Township thirty-six (36) north, range thirty-seven (37) east, Willamette Meridian, excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway), containing 13.80 acres, more or less.

Also, a tract of land containing 79.43 acres, more or less, being all of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of section twelve (12), and a portion of the southwest quarter of the southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$) of section twelve (12) and the Northwest quarter of the Northwest quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), all in Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the north line of the southwest quarter of the southwest quarter

(SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section twelve (12), which point bears north 02°01'13" West 1320.00 feet and North 85°30'05" East 108.45 feet from the southwest corner of said Section twelve (12); running thence north 85°30'05" east 2417.99 feet to the northeast corner of the southeast quarter of the southwest [13] quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of said section twelve (12); thence South 01°37'15" East 1313.28 feet to the quarter section corner on the south line of said Section twelve (12); thence south 85°20'21" west 1262.15 feet along the south line of said section twelve (12) to the southwest corner of the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of said section twelve (12); thence south 03°10'19" east 1185.64 feet along the east line of the northwest quarter of the northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of said Section thirteen (13); thence north 30°16'40" West 70.25 feet; thence North 54°17'10" West 416.42 feet; thence North 34°18'20" West 472.22 feet; thence North 29°05'20" West 240.05 feet; thence North 13°13'50" East 234.53 feet to a point on the north line of said Section thirteen (13), which point bears North 85°20'21" East 622.95 feet from the northwest section corner of said section thirteen (13); thence north 13°13'50" east 74.75 feet; thence North 21°36'20" west 264.07 feet; thence North 41°24'20" West 197.32 feet; thence North 28°20'00" West 219.54 feet; thence North 21°36'00" West 664.17 feet to the point of beginning.

The following described property situate in the County of Ferry, State of Washington, to-wit:

A tract of land containing 34.09 acres, more or less, being that portion of Lot two (2), Lot five (5) (formerly known as Lot 1) and Lot six (6) (formerly known as Lot 3), of section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, between the west line of the Columbia River and a line described as follows: Commencing at a point on the south line of Lot six (6) (formerly known as Lot 3) of said Section eleven (11), which point bears south $02^{\circ}08'00''$ East 1320.68 feet and North $87^{\circ}56'06''$ East 1977.31 feet from the quarter section corner on the west line of said section eleven (11); running thence North $05^{\circ}26'30''$ East 493.38 feet; thence North $23^{\circ}37'40''$ east 511.06 feet; thence south $44^{\circ}39'00''$ East 309.36 feet; thence north $03^{\circ}30'50''$ East 255.82 feet; thence North $10^{\circ}53'10''$ West 376.77 feet; thence north $01^{\circ}36'10''$ east 250.34 feet; thence North $38^{\circ}35'00''$ east 371.59 feet; thence south $04^{\circ}28'10''$ east 608.63 feet; thence north $12^{\circ}48'20''$ East 461.47 feet; thence North $02^{\circ}12'10''$ East 375.15 feet; thence North $63^{\circ}18'10''$ West 269.31 feet; thence North $01^{\circ}32'00''$ east 628.77 feet; thence North $08^{\circ}59'50''$ east 619.09 feet; thence North $27^{\circ}46'00''$ West 217.77 feet; thence South $81^{\circ}55'20''$ East 228.43 feet; thence North

32°15'00" East 383.24 feet; thence North 56°35'40" east 64.33 feet to a point on the north line of said section eleven (11), which point bears north 87°44'41" east 621.57 feet from the quarter section corner on the north line of said section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated October 30, 1928, as set forth in Book 5 of Miscellaneous Deeds, at page 111, of the records of Ferry County, Washington, to erect, construct, reconstruct, and maintain a gaging station together with the necessary steel tower, anchors, cables, guys and appurtenances over, along and across Lot six (6) of section twenty-two (22), Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian;

Also, that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated September 21, 1934, as set forth in Book 5 of Miscellaneous Records, at page 299 of the records of Ferry County, Washington, to erect, construct, reconstruct and maintain a gaging station together with the necessary appurtenances over, along and across Lot three (3) of section twenty-two (22),

Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian.

Estimated value of the said tract No. 1 being acquired [14] is Seven thousand nine hundred fifty and 35/100 Dollars (\$7,950.35).

Tract No. 2
(Hummel Tract)

Also the following described property situate in the County of Stevens, State of Washington, to-wit:

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North $86^{\circ}09'57''$ east 2568.16 feet and North $03^{\circ}38'34''$ West 247.27 feet from the quarter section corner on the west line of said Section thirteen (13); running thence North $64^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet; thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}$

NW $\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13) to the point of beginning.

Estimated value of said Tract No. 2 being acquired is Two hundred forty-one and $35/100$ Dollars (\$241.35).

That said land is taken under the authority of the Constitution and Laws of the United States for the following purposes:

(1) Regulation and control of the flow of the Columbia River a navigable stream of the United States, by means of a dam located at the Grand Coulee site and a storage reservoir above said site for use at said Grand Coulee site and at all the damsites on the Columbia River below said Grand Coulee and all parts of said Columbia River from the Canadian Line to the mouth of said stream for the following purposes:

- (a) Improvement of navigation;
- (b) Flood control;
- (c) Hydro-electric power development at said Grand Coulee site and at each of the proposed damsites below the said Grand Coulee

site as an aid and incident to the other purposes herein enumerated, including the increase of the amount of firm power which may be made available at each of the lower damsites on [15] said stream and the improvement of the feasibility of each of said proposed lower dams on the Columbia River as self-liquidating projects;

(d) Reclamation of arid and semi-arid land, including public land of the United States;

(e) Domestic use of water, including use by entrymen on public lands;

and that by virtue of appropriations made by Congress for the purposes aforesaid, funds are available for just compensation for said land so taken.

In Witness Whereof, I have hereunto set my hand this 15th day of November, 1939, in the City of Washington, District of Columbia.

JOHN W. FINCH,

Acting Under Secretary of the Interior of the
United States of America.

[Endorsed]: Filed Dec. 9, 1939. A. A. LaFramboise, Clerk. [16]

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ANGE 37 E W.M.,
V. 26, 1904 BY
GENERAL'S
OLYMPIA, WASH.



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RESERVIOR BOUNDARIES

12	13	N 0	32	00E	375.12
13	14	N 08	59	50E	269.31
14	15	N 27	46	20 W	628.77
15	16	S 81	55	20E	619.09
16	17	N 32	15	00E	177.77
17	18	N 56	35	40E	228.43
					383.24
					64.33

EAST SIDE

FROM	TO	BEARING			DIST. FEET
		DEG.	MIN.	SEC.	
3	4	N 05	35	00E	207.92
4	5	N 36	13	00E	476.48
5	6	N 07	55	20E	517.39
6	7	N 00	01	00E	296.85
7	8	N 11	31	40E	220.19
8	9	N 11	31	40E	184.15
9	10	N 27	35	10E	241.46
10	11	N 44	34	50E	285.64
11	12	N 11	38	10 W	583.14
12	13	S 77	21	40E	335.03
13	14	N 52	09	20E	291.35
14	15	N 60	55	10E	338.99
15	16	N 37	37	10E	303.06
16	17	N 23	43	20E	456.88
17	18	S 67	15	00E	333.86
18	19	S 47	22	10E	305.19
19	20	S 38	01	00E	160.95
21	22	S 21	36	00E	664.17
22	23	S 28	20	00E	219.54
23	24	S 41	24	20E	197.32
24	25	S 21	36	20E	264.07
25	26	S 13	13	50 W	74.75
26	27	S 13	13	50 W	234.53
27	28	S 29	05	20E	240.05
28	29	S 34	18	20E	472.22
29	30	S 54	17	10E	416.42
30	31	S 30	16	40E	70.25
32	33	S 26	06	00E	413.09
33	34	S 33	14	50E	307.77
34	35	S 63	23	20E	522.80
35	36	S 74	52	50E	393.47
36	37	S 64	49	10E	95.80

-  TRACT. NO. 1 TO BE ACQUIRED BY THE UNITED STATES. 330.31 ACRES
-  TRACT NO. 2 TO BE ACQUIRED BY THE UNITED STATES. 21.27 ACRES

site as an aid and incident to the other purposes herein enumerated, including the increase of the amount of firm power which may be made available at each of the lower damsites on [15] said stream and the improvement of the feasibility of each of said proposed lower dams on the Columbia River as self-liquidating projects;

(d) Reclamation of arid and semi-arid land, including public land of the United States;

(e) Domestic use of water, including use by entrymen on public lands;

and that by virtue of appropriations made by Congress for the purposes aforesaid, funds are available for just compensation for said land so taken.

In Witness Whereof, I have hereunto set my hand this 15th day of November, 1939, in the City of Washington, District of Columbia.

JOHN W. FINCH,

Acting Under Secretary of the Interior of the
United States of America.

[Endorsed]: Filed Dec. 9, 1939. A. A. LaFramboise, Clerk. [16]

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PLAT —

PLAT OF SEC.

NGE 37 E W.M.,

26, 1904 BY

GENERAL'S

MPLIA, WASH.

END—

RESERVIOR BOUNDARIES

12	13	N 0	32	00E	628.77
13	14	N 08	59	50E	619.09
14	15	N 27	46	00W	617.77
15	16	S 81	55	20E	228.43
16	17	N 32	15	00E	383.24
17	18	N 56	35	40E	64.33

EAST SIDE

FROM	TO	BEARING			DIST. FEET
		DEG.	MIN.	SEC.	
3	4	N 05	35	00E	207.92
4	5	N 36	13	00E	476.48
5	6	N 07	55	20E	517.39
6	7	N 00	01	00E	296.85
7	8	N 11	31	40E	220.19
8	9	N 11	31	40E	184.15
9	10	N 27	35	10E	241.46
10	11	N 44	34	50E	285.64
11	12	N 11	38	10W	583.14
12	13	S 77	21	40E	335.03
13	14	N 52	09	20E	291.35
14	15	N 60	55	10E	338.99
15	16	N 37	37	10E	303.06
16	17	N 23	43	20E	456.88
17	18	S 67	15	00E	333.86
18	19	S 47	22	10E	305.19
19	20	S 38	01	00E	160.95
21	22	S 21	36	00E	664.17
22	23	S 28	20	00E	219.54
23	24	S 41	24	20E	197.32
24	25	S 21	36	20E	264.07
25	26	S 13	13	50W	74.75
26	27	S 13	13	50W	234.53
27	28	S 29	05	20E	240.06
28	29	S 34	18	20E	472.22
29	30	S 54	17	10E	416.42
30	31	S 30	16	40E	70.25
32	33	S 26	06	00E	413.09
33	34	S 33	14	50E	307.77
34	35	S 63	23	20E	522.80
35	36	S 74	52	50E	393.47
36	37	S 64	49	10E	95.80

TRACT. NO. 1 TO BE ACQUIRED BY THE
UNITED STATES. 330.31 ACRES

TRACT NO. 2 TO BE ACQUIRED BY THE
UNITED STATES. 21.27 ACRES

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[Title of District Court and Cause.]

JUDGMENT ON DECLARATION
OF TAKING

This cause coming on to be heard upon the motion of the petitioner, the United States of America, to enter a judgment on the Declaration of Taking filed in the above-entitled cause on December 9th 1939, and for an order fixing the date when possession of the property herein described is to be surrendered to the United States of America, and upon consideration thereof and of the condemnation petition filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the Court

First, That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said petition:

Second, That a petition in condemnation was filed at the request of the Acting Under Secretary of the Interior of the United States, the authority empowered by law to acquire the lands described in said petition, and also under authority of the Attorney General of the United States:

Third, That said petition and Declaration of Taking state the authority under which, and the public use for which said lands were taken, that the Acting Under Secretary of the Interior of the United States is the person authorized and empowered by law to acquire lands such as are described in the petition for the purposes therein

stated, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth, That a proper description of the land sought to be taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth, That said Declaration of Taking contains a statement of the estate or interest in the said lands taken for said public use; [18]

Sixth, That a plat showing the lands taken is incorporated in said Declaration of Taking;

Seventh, That a statement is contained in said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for said lands, in the amount of \$8,191.70 and that said sum was deposited in the Registry of this Court, for the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking;

Eighth, That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation for the taking of said property, in the opinion of the said Acting Under Secretary of the Interior will be within any limits prescribed by Congress as to the price to be paid therefor; it is therefore, this 9th day of December, 1939,

Adjudged, Ordered and Decreed that the title to
[19]

Tract No. 1

(The Washington Water Power Company
tract)

The following described property situate in the County of Stevens, State of Washington, to-wit:

Lot one (1) in the northeast quarter ($NE\frac{1}{4}$), Lot two (2) in the northeast quarter ($NE\frac{1}{4}$), and lot three (3) in the southeast quarter ($SE\frac{1}{4}$) of Section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian (patented under date of July 22, 1896 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus) being islands in the Columbia River, containing 88.85 acres, more or less.

Also, Lot one (1), the north half of Lot two ($N\frac{1}{2}$ of Lot 2), the north half of the southeast quarter of the northwest quarter ($N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$) and the northeast quarter of the northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section twelve (12), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, containing 93.00 acres, more or less.

Also, a tract of land containing 21.14 acres, more or less, being that portion of Lot one (1) and the southwest quarter of the northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$) of section fourteen (14), and that portion of Lots one (1) and two (2) and the southeast quarter of the southeast quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section eleven (11) (pat-

ented under date of June 8, 1891 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus), all in Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, lying between the east line of the Columbia River and a line described as follows: Beginning at a point on the west line of the southwest quarter of the northeast quarter ($SW\frac{1}{4}$ $NE\frac{1}{4}$) of said Section fourteen (14), which point bears North $02^{\circ}54'10''$ west 1070.85 feet and south $87^{\circ}57'49''$ West 2630.26 feet from the quarter section corner on east line of said Section Fourteen (14); running thence North $05^{\circ}35'00''$ East 207.92 feet; thence North $36^{\circ}13'00''$ East 476.48 feet; thence North $07^{\circ}55'20''$ East 517.39 feet; thence North $00^{\circ}01'00''$ East 296.85 feet; thence North $11^{\circ}31'40''$ East 220.19 feet; to a point on the north line of said Section fourteen (14), which point bears South $87^{\circ}59'45''$ West 2141.46 feet from the northeast section corner of said section fourteen (14); thence North $11^{\circ}31'40''$ East 184.15 feet; thence north $27^{\circ}35'10''$ east 241.46 feet; thence North $44^{\circ}34'50''$ East 285.64 feet; thence North $11^{\circ}38'10''$ West 583.14 feet; thence south $77^{\circ}21'40''$ East 335.03 feet; thence North $52^{\circ}09'20''$ east 291.35 feet; thence North $60^{\circ}55'10''$ East 338.99 feet; thence North $37^{\circ}37'10''$ East 303.06 feet; thence North $23^{\circ}43'20''$ East 456.88 feet; thence South

67°15'00" east 333.86 feet; thence South 47°22'10" East 305.19 feet; thence south 38°01'00" East 160.95 feet to a point on the east line of said Section eleven (11), which point bears North 02°01'13" West 1561.06 feet from the southeast section corner of said Section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also, Lot two (2) of Section fourteen (14), Township thirty-six (36) north, range thirty-seven (37) east, Willamette Meridian, excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway), containing 13.80 acres, more or less.

Also, a tract of land containing 79.43 acres, more or less, being all of the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of section twelve (12), and a portion of the southwest quarter of the southwest quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$) of section twelve (12) and the Northwest quarter of the Northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of section thirteen (13), all in Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the north line of the southwest quarter of the southwest quarter

(SW $\frac{1}{4}$ SW $\frac{1}{4}$) of said Section twelve (12), which point bears north 02°01'13" West 1320.00 feet and North 85°30'05" East 108.45 feet from the southwest corner of said Section twelve (12); running thence north 85°30'05" east 2417.99 feet to the northeast corner of the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of said section twelve (12); thence South 01°37'15" East 1313.28 feet to the quarter section corner on the south line of said Section twelve (12); thence south 85°20'21" west 1262.15 feet along the south line of said section twelve (12) to the southwest corner of the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of said section twelve (12); thence south 03°10'19" east 1185.64 feet along the east line of the northwest quarter of the northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of said Section thirteen (13); thence north 30°16'40" West 70.25 feet; thence North 54°17'10" West 416.42 feet; thence North 34°18'20" West 472.22 feet; thence North 29°05'20" West 240.05 feet; thence North 13°13'50" East 234.53 feet to a point on the north line of said Section thirteen (13), which point bears North 85°20'21" East 622.95 feet from the northwest section corner of said section thirteen (13); thence north 13°13'50" east 74.75 feet; thence North 21°36'20" west 264.07 feet; thence North 41°24'20" West 197.32 feet; thence North 28°20'00" West 219.54 feet; thence North 21°36'00" West 664.17 feet to the point of beginning. [21]

The following described property situate in the County of Ferry, State of Washington, to-wit:

A tract of land containing 34.09 acres, more or less, being that portion of Lot two (2), Lot five (5) (formerly known as Lot 1) and Lot six (6) (formerly known as Lot 3), of section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, between the west line of the Columbia River and a line described as follows: Commencing at a point on the south line of Lot six (6) (formerly known as Lot 3) of said Section eleven (11), which point bears south $02^{\circ}08'00''$ East 1320.68 feet and North $87^{\circ}56'06''$ East 1977.31 feet from the quarter section corner on the west line of said section eleven (11); running thence North $05^{\circ}26'30''$ East 493.38 feet; thence North $23^{\circ}37'40''$ east 511.06 feet; thence south $44^{\circ}39'00''$ East 309.36 feet; thence north $03^{\circ}30'50''$ East 255.82 feet; thence North $10^{\circ}53'10''$ West 376.77 feet; thence north $01^{\circ}36'10''$ east 250.34 feet; thence North $38^{\circ}35'00''$ east 371.59 feet; thence south $04^{\circ}28'10''$ east 608.63 feet; thence north $12^{\circ}48'20''$ East 461.47 feet; thence North $02^{\circ}12'10''$ East 375.15 feet; thence North $63^{\circ}18'10''$ West 269.31 feet; thence North $01^{\circ}32'00''$ east 628.77 feet; thence North $08^{\circ}59'50''$ east 619.09 feet; thence North $27^{\circ}46'00''$ West 217.77 feet; thence South $81^{\circ}55'20''$ East 228.43 feet; thence North

32°15'00" East 383.24 feet; thence North 56°35'40" east 64.33 feet to a point on the north line of said section eleven (11), which point bears north 87°44'41" east 621.57 feet from the quarter section corner on the north line of said section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated October 30, 1928, as set forth in Book 5 of Miscellaneous Deeds, at page 111, of the records of Ferry County, Washington, to erect, construct, reconstruct, and maintain a gaging station together with the necessary steel tower, anchors, cables, guys and appurtenances over, along and across Lot six (6) of section twenty-two (22), Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian;

Also, that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated September 21, 1934, as set forth in Book 5 of Miscellaneous Records, at page 299 of the records of Ferry County, Washington, to erect, construct, reconstruct and maintain a gaging station together with the necessary appurtenances over, along and across Lot three (3) of section twenty-two (22),

Township thirty-six (36) North, Range thirty seven (37) East, Willamette Meridian. [22]

Tract No. 2

(Hummel Tract)

Also the following described property situate in the County of Stevens, State of Washington, to-wit:

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North $86^{\circ}09'57''$ east 2568.16 feet and North $03^{\circ}38'34''$ West 247.27 feet from the quarter section corner on the west line of said Section thirteen (13); running thence North $64^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet; thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the

northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13) to the point of beginning. [23]

in fee simple vested in the United States of America upon the filing of said Declaration of Taking and the Depositing in the Registry of this court of the said sum of \$8,191.70, as hereinabove recited, that said lands are deemed to have been condemned and taken for the use of the United States of America and the right to just compensation for the property taken, upon the filing of the Declaration of Taking, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

It is further Adjudged, Ordered and Decreed that possession of all such property that is now vacant, unoccupied and uncultivated be given to the United States of America on or before the 8th day of January, 1940; that as to the part of such property that is now occupied or cultivated, possession be given to the United States of America on or before the 18th day of January, 1940, and this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises.

Dated this 9th day of December, 1939.

LLOYD L. BLACK,
United States District Judge.

Presented by

SAM M. DRIVER,

United States Attorney.

[Endorsed]: Filed Dec. 9, 1939. A. A. LaFramboise, Clerk. [24]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the plaintiff and the defendant The Washington Water Power Company, for the purposes of this case only:

1. That The Washington Water Power Company is the owner of all the land described in the petition and sought to be condemned in the above entitled proceeding, except the tract designated in said petition as "Tract No. 2 (Hummel Tract)", which it is agreed was owned by Lillian C. Hummel, a spinster, prior to the filing of the declaration of taking in the above entitled case. That the lands owned by The Washington Water Power Company and so described in said petition are a part of a larger tract of land purchased as a unit by The Washington Water Power Company in the vicinity of Kettle Falls, which tract is described as follows:

	Sec.	Twp.	Range	
Lots 2, 5, (formerly lot 1), and Lot 6 (formerly lot 3)	11	36 N.	37 E.W.M.	In Ferry County, Washington
Lots 1, 2, and 3, being islands in the Columbia River	11	36 N.	37 E.W.M.	In Stevens County, Washington
Lots 1 and 2, and SE $\frac{1}{4}$ SE $\frac{1}{4}$	11	36 N.	37 E.W.M.	In Stevens County Washington
Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ of Lot 2, NE $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, and S $\frac{1}{2}$ SW $\frac{1}{4}$	12	36 N.	37 E.W.M.	In Stevens County, Washington
W $\frac{1}{2}$ NW $\frac{1}{4}$	13	36 N.	37 E.W.M.	In Stevens County, Washington
Lots 1 and $\frac{2}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, and E $\frac{1}{2}$ NE $\frac{1}{4}$	14	36 N.	37 E.W.M.	In Stevens County, Washington.

Should the Court hold that the defendant The Washington Water Power Company is entitled to offer evidence of power site values, then it is agreed that on the date of the entry of the judgment on Declaration of Taking herein entered (December 9, 1939), the value of the portion of the above described [25] lands not described in the Declaration of Taking filed in the above-entitled case was Seven Thousand Six Hundred Ten and 00/100 Dollars (\$7,610.00).

2. That the Columbia River is a navigable stream throughout its entire length in the United States.

3. That the words "power site values" whenever herein used shall mean the enhanced market value, if any, the lands being condemned may have because of their extent, particular location, and rela-

tion to the Columbia River, rock formation, or other characteristics which might make said lands suitable or adaptable for a hydroelectric power development, or the value, if any, said lands may have as a part of or for use in connection with any undertaking to create any hydroelectric power development.

4. That the said lands of the defendant The Washington Water Power Company, being condemned in the above entitled proceeding, are riparian lands adjoining or adjacent to that part of the river bed commonly known as Kettle Falls as shown on the map attached to the petition for condemnation herein. That to utilize defendant's said property for power site purposes would require the construction of a dam on and across the bed of the Columbia River at or near Kettle Falls and the construction of various structures in the channel of said stream and between the ordinary high water line and the low water line thereof.

5. That the lands of the defendant The Washington Water Power Company, being condemned in this proceeding, have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars (\$7,950.35).

6. That should the Court hold that evidence of power site values is inadmissible then it is stipulated and agreed that what severance damages, if any, the said defendant, The Washington Water Power Company, has suffered to the remainder or unappropriated portion of its holdings are included in the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars (\$7,950.35) [26] and the award to the defendant should be the said sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars (\$7,950.35). But in the event the Court holds that evidence of power site values is admissible then either party may offer such evidence as may be competent, material and relevant concerning damages to the remainder of said defendant's property.

7. That should the Court hold that said defendant The Washington Water Power Company is entitled to offer evidence of power site values then it is agreed that there could be safely constructed at Kettle Falls on the Columbia River, partly on said lands of said defendant being condemned and partly on lands in the bed of the Columbia River between high and low water thereof, a dam and power house, the power house to contain water turbines and generators operated ultimately under a maximum head of 124 feet and a minimum head of 75 feet and a mean static head of 114 feet, and that it is physically practical and feasible to construct and operate such a hydroelectric power development at the said Kettle Falls. That a completed hydroelectric power plant, or one capable of generating electric energy,

could not be built solely on said defendant's lands but would require the use of lands within the bed of the Columbia River.

8. Both parties reserve all rights to except to any adverse ruling by the Court on the question whether the said defendant is entitled to offer evidence of power site values for its said lands and all rights of appeal therefrom and all rights to present their respective contentions on that question in the appellate courts and the right to object to evidence or testimony offered in support of such power site values. This stipulation shall not be considered as a waiver of any such rights by either party.

9. That photostatic or other copies of orders, proceedings before, or records of the Federal Power Commission, of the State Supervisor of Hydraulics of Washington, of the United States Army Engineers, of the United States Geological Survey, of the State Land Commissioner of Washington, and correspondence and records re expense paid by The Washington Water Power Company to Government and Government employees, and letters to and from The Washington Water Power Company, the Federal Power Commission, the State Supervisor of [27] Hydraulics of Washington, the United States Army Engineers, the United States Geological Survey, the State Land Commissioner of Washington, including photostatic or other copies of carbon copies of letters addressed to the same where such carbon copies are found regularly filed in the files

of either party thereto, if otherwise admissible, will be given the same effect and will be considered with equal standing with the original as to admissibility, provided that at least thirty (30) days prior to the day set for trial of this cause the said defendant will deliver to the plaintiff duplicates of any such photostatic or other copies which it proposes to offer at the trial of this cause; and that at least fifteen (15) days prior to the day set for trial of this cause the said plaintiff will deliver to the said defendant duplicates of any such photostatic or other copies which it proposes to offer at the trial of this cause; it being understood that neither party shall be obliged to offer at the trial any such copies but that the right to offer such photostatic or other copies, instead of the originals, will be limited to those photostatic or other copies duplicates of which have been served upon the opposing parties the agreed length of time prior to trial. Unless otherwise shown, the introduction of such photostatic or other copies of letters and carbon copies thereof will be proof that all such letters or carbon copies, of which photostatic or other copies are admitted in evidence were received by the parties to whom they were addressed. Both parties reserve the right to object to any such copy of orders, records, proceeding or letters on the ground that same are immaterial, or any other ground of objection which would properly apply to original records, other than lack of specific proof that such letters or communications were sent by the party signing the same

or received by the party to whom they were addressed.

It Is Agreed, however, that if either party upon checking photostatic copy served upon it by the other party with the original or official records shall find errors in such copy or discrepancy between such copy and the original or official records, such errors in the copies will be corrected so that the copies will correspond with the original records.

It Is Further Agreed that upon checking of photostatic copies of purported [28] correspondence between the defendant and the Washington State Supervisor of Hydraulics and of the application for permit to appropriate water and the application for permit to construct a reservoir and to store for beneficial use the unappropriated water of the State of Washington, heretofore served by defendant upon the plaintiff, errors in the copies and discrepancies between the purported copies and the original records have been found as follows:

(1) The served copy of application for permit to appropriate water is a photostat of a duplicate and differs from the original in the office of the Washington State Supervisor of Hydraulics in that the original in the office of the State Supervisor of Hydraulics bears a notation in red ink on the first line thereof, "Cancelled 3-3-37", which notation does not appear on the served copy.

(2) The served copy of application for a permit to construct a reservoir and to store for beneficial use the unappropriated waters of the State of Wash-

ington is a photostat of a duplicate and differs from the original in the office of the State Supervisor of Hydraulics in that the original in the office of the State Supervisor of Hydraulics bears a notation in red ink on the first line thereof, "Cancelled 3-3-37" which notation does not appear on the served copy.

(3) The office memorandum of V. H. Greisser, relating to Mr. Chase's letter of January 26, 1922, is merely an office memorandum of the defendant company and does not appear in the files of the State Supervisor of Hydraulics.

(4) The purported letter of July 12, 1932, from F. T. Post as President of The Washington Water Power Company was not sent or received.

It Is Further Agreed between the parties hereto that prior to the time of trial one or more of the attorneys for each of the parties hereto will deposit with the Clerk of the above entitled Court duplicate photostatic or other copies of such orders, records, proceedings and letters as have been served by each of the parties hereto pursuant to the provisions of this stipulation. That such photostatic or other copies so deposited with the Clerk of the above entitled Court shall be placed by the said Clerk, or one [29] of his deputies, according to the classification of such copies, in one of several envelopes labeled as follows, to-wit:

Correspondence with, proceedings before, orders and records of the Federal Power Commission;

Correspondence with, orders and records of the State Supervisor of Hydraulics of Washington;

Correspondence with, orders and records of the United States Army Engineers;

Correspondence with, orders and records of the State Land Commissioner of Washington;

Correspondence with, orders and records of the United States Geological Survey;

Correspondence and records re expense paid by The Washington Water Power Company to Government and Government Employees.

It Is Further Agreed that each of the envelopes in which the said photostatic or other copies are deposited, as heretofore provided, shall, in addition to the label thereon heretofore mentioned, have written upon said envelopes the following written matter;

“In the District Court of the United States for the Eastern District of Washington Northern Division

No. 52

United States of America,

Petitioner,

vs.

The Washington Water Power Company, a corporation, et al.,

Defendants.

It Is Hereby Agreed By and between attorneys for the parties hereto, made and entered

into the date hereunto fixed, that the photostatic or other copies contained in this envelope are those which have been regularly served in accordance with the terms of that stipulation made and entered into by and between the parties hereto with reference to photostatic or other copies and have been compared by representatives of the parties hereto. Said photostatic or other copies may be offered in evidence subject to the terms of the aforementioned stipulation.

Signed in the presence of the Clerk of the above entitled Court this day of, 1941.

Signed in my presence this day of, 1941.

.....
Attorneys for Petitioner.

.....
Clerk of the above entitled Court.

.....
Attorneys for The Washington
Water Power Company, The
City Bank Farmers Trust
Company, and Ralph E. Mor-
ton, trustee, Defendants.”

[30]

It Is Further Agreed that after the photostatic or other copies have been so deposited by the attorney or attorneys for the parties hereto, the Clerk of the above entitled Court shall seal each of the envelopes in which the same are deposited; and that the attorney or attorneys for the parties so depositing said photostatic or other copies shall sign that agreement set forth by the written matter contained on each of the envelopes in which the photostatic or other copies are so deposited; and the clerk of the above entitled Court shall attest the signing of said agreement by the said attorneys by signing his name in the place provided therefor in said written matter.

It Is Further Agreed that the envelopes in which said photostatic or other copies are so deposited shall be retained by the Clerk of the above entitled Court in his possession until the time of trial, when said envelopes shall be produced in open Court by the said Clerk.

10. That copies of any maps, reports, records, or statistics compiled or published under authority of the United States of America, or any State of the Union, or of any Department, Officer, Board, Commission or Tribunal of the United States, or of any of said States, may be received in evidence without authentication or certification and without objection except as to relevancy or materiality. The right to object to the admission in evidence of maps, reports, records, or statistics on the ground of irrelevancy or immateriality is expressly reserved.

11. That the plaintiff has the right to condemn the said lands for the purposes named in the complaint.

12. That the backwater from said proposed dam at said Kettle Falls would flood approximately 518 different tracts of privately owned land in approximately 400 different ownerships, and would also flood some withdrawn or reserved public land of the United States (including Indian Reservation land) and also some State land.

It Is Agreed that the reasonable market value (for all purposes other than reservoir site or power site purposes) of the property which would be flooded by the proposed dam at Kettle Falls, exclusive of railroad and highway [31] property is approximately One Million Dollars (\$1,000,000.00) and that it would cost approximately Two Million Dollars (\$2,000,000.00) to relocate and reconstruct the railroad and highways which would be flooded by the said proposed Kettle Falls dam, and that there are two other power sites in the area which would be flooded by said dam.

13. That the defendants City Bank Farmers Trust Company and Ralph E. Morton, Trustee, have no interest in the premises involved in this action except under mortgage or deed of trust from The Washington Water Power Company and shall be bound by this stipulation to the same extent and in the same manner as The Washington Water Power Company.

Dated July 2, 1941.

LYLE KEITH,
B. E. STOUTEMYER,
Attorneys for Petitioner.
POST, RUSSELL, DAVIS &
PAINE,

H. E. T. HERMAN,
Attorneys for The Washing-
ton Water Power Company,
the City Bank Farmers
Trust Company, and Ralph
E. Morton, Trustee, De-
fendants.

[Endorsed]: Filed Aug. 19, 1941. A. A. LaFram-
boise, Clerk. [32]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between petitioner United States of America and the defendant Washington Water Power Company as follows:

(1) That the petitioner herein on December 9, 1939, filed its petition for condemnation of the certain premises, easements and rights therein described.

(2) That on December 9, 1939, the petitioner filed a declaration of taking vesting title to the cer-

tain premises, easements and rights described in the petition in the United States of America and judgment on declaration of taking was entered and adjudged in the above-entitled court on December 9, 1939.

(3) That included in the lands the title to which was acquired by the petitioner in the above-entitled proceedings is the following described tract situated in the County of Stevens, State of Washington, to-wit:

Tract No. 2

(Hummel Tract)

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North $86^{\circ}09'57''$ east 2568.16 feet and North $03^{\circ}38'34''$ West 247.27 feet from the quarter section corner on the west line of said Section thirteen (13); running thence North $64^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet;

thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13) to the point of beginning.

(4) That the tract described in paragraph 3 above on the date of the taking was owned by the defendant Lillian C. Hummel, a spinster; that the estimated fair market value of the said tract was \$241.35; and that said amount was deposited with the Clerk of the above-entitled court by the petitioner as compensation for the taking of said premises. [33]

(5) That the defendant The Washington Water Power Company, a corporation, hereby waives any claim to compensation for such premises and hereby stipulates and agrees that the Judge of the above-entitled court may enter a judgment in conformity with this stipulation; and stipulates that the estimated fair market value of all the premises described in said petition may be reduced to the extent of the \$241.35 herein stipulated and agreed to be

paid to the said defendant Lillian C. Hummel, a spinster.

Dated this 21 day of August, 1941.

LYLE KEITH,

United States Attorney.

B. E. STOUTEMYER,

Assistant United States At-
torney.

H. E. T. HERMAN,

POST, RUSSELL, DAVIS &
PAINE,

Attorneys for The Washing-
ton Water Power Company,
a corporation.

[Endorsed]: Filed Sep. 16, 1941. A. A. LaFram-
boise, Clerk. [34]

[Title of District Court and Cause.]

JUDGMENT ON STIPULATION

(Hummel Tract)

The above-entitled cause came on for hearing this day pursuant to that certain stipulation heretofore entered into between the petitioner and the defendant Lillian C. Hummel, for the entry of a judgment herein directing payment to the defendant Lillian C. Hummel of the sum of \$241.35 heretofore deposited by the petitioner with the clerk of this court as estimated just compensation for the taking

of the tract of land hereinafter described, and pursuant to that certain stipulation heretofore entered into between the petitioner and the defendant The Washington Water Power Company, a corporation, waiving any claim to compensation for said tract; and it appearing that said defendant, Lillian C. Hummel, a spinster, was at the time of the taking of said tract of land by the Government the sole and exclusive owner thereof and that said defendant has by stipulation agreed to accept the sum of \$241.35 in full settlement for the condemnation and taking of said tract of land hereinafter described;

Now, Therefore, the Court having considered said stipulations and having found the amount of such consideration to be the fair and reasonable value of said tract of land so taken and of all damages [35] sustained by reason of such taking, and having found that there are no persons having any right to compensation except as set forth therein, and the Court being generally fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the clerk of this court pay the sum of \$241.35 now on deposit with the clerk for the tract of land hereinafter described to the said Lillian C. Hummel, a spinster, less unpaid taxes, if any. That such payment be made without any deduction for clerk's fees, commission or poundage. That no interest shall be paid on said sum.

It Is Further Ordered, Adjudged and Decreed that the consideration hereinabove expressed represents the full and fair value of the tract of land below described, together with any and all damages which have been sustained or may be sustained by all persons whatsoever by reason of the condemnation and taking thereof by the United States, and that payment of the moneys hereinabove ordered shall constitute full settlement of all claims against the United States of America and the final award of just compensation for the taking of said tract of land situated in the County of Stevens, State of Washington, and more particularly described as follows, to-wit:

Tract No. 2

(Hummel Tract)

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North $86^{\circ}09'57''$ east 2568.16 feet and North $03^{\circ}38'34''$ West 247.27 feet from the quarter section corner on the west line of said Section thirteen

(13); running thence North $61^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet; thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the [36] northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13) to the point of beginning.

It Is Further Ordered, Adjudged and Decreed that the public use requires the condemnation of said tract of land, and that title to said tract is vested in the United States of America in fee simple, free and clear of any and all charges, interests, claims, taxes, liens and encumbrances of any kind or character whatsoever.

It Is Further Ordered, Adjudged and Decreed that, it appearing that they have no interest in the premises herein described, the unknown heirs of any of the defendants herein, if deceased, and all other persons, firms or corporations, unknown, having or claiming to have any right, title, estate, lien

or interest in or to said tract of land, or any portion thereof are hereby dismissed as to said tract.

Dated this 24 day of September, 1941.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by:

LYLE KEITH,
United States Attorney.

[Endorsed]: Filed Sep. 24, 1941. A. A. LaFramboise, Clerk. [37]

[Title of District Court and Cause.]

TRANSCRIPT OF EVIDENCE AND
PROCEEDINGS [38]

Before:

Hon. Lewis W. Schwellenbach, J., and a Jury.

Date:

September 15, 1941.

Appearances:

For the Petitioner:

Lyle D. Keith, District Attorney,
Federal Building,
Spokane, Washington.

B. E. Stoutemyer, District Counsel,
United States Bureau of Reclamation,
Portland, Oregon.

For the Defendant The Washington Water
Power Company:

Post, Russell, Davis & Paine, Attorneys,
Spokane & Eastern Building,
Spokane, Washington.

H. E. T. Herman, Attorney,
Columbia Building,
Spokane, Washington.

For the Defendant Ferry County:

Osee W. Noble, Prosecuting Attorney,
Republic, Washington.

For the Defendant Stevens County:

F. Leo Grimstead, Prosecuting Attorney,
Colville, Washington.

Be It Remembered:

That the above entitled cause came on for trial and determination on the 15th day of September, 1941, at the hour of 9:30 o'clock in the forenoon of said day before the Hon. Lewis W. Schwellenbach, Judge presiding and a jury, in the District Court of the United States For the Eastern Dis-
[39] trict of Washington, Northern Division, the petitioner, The United States of America, appearing by Lyle D. Keith, District Attorney, Spokane, Washington, and B. E. Stoutemyer, District Counsel, United States Bureau of Reclamation, Portland, Oregon; the Defendant The Washington Water Power Company appearing by its attorneys Post, Russell, Davis & Paine (Mr. Alan G. Paine

being personally present), and H. E. T. Herman; the Defendant Ferry County appearing by its attorney Osee W. Noble, Prosecuting Attorney, and the Defendant Stevens County appearing by its attorney F. Leo Grimstead, Prosecuting Attorney, and all parties present having announced they were ready for trial, the following proceedings were had:

[40]

The Court: Mr. Keith, will you explain to me the status with reference to the parties. There were a large number of parties when this case was originally started.

Mr. Keith: Aside from those represented here, the only other defendant who has made an appearance is Lillian C. Hummel, who is the owner of a tract of land. I might say in regard to that tract a stipulation has been signed between the plaintiff and The Washington Water Power Company, by which The Washington Water Power Company disclaims interest in that tract and a stipulation as to the value of the tract between the defendant Lillian C. Hummel and the plaintiff has been entered into and will be filed. It was received only this morning, so that situation, I think, will be taken care of by judgment entered pursuant to the stipulation, as to the Hummel tract. Other than the owners of that tract and the parties who are represented in court, no other appearances have been made. I therefore move that an Order of Default be entered as against all remaining defendants.

The Court: The motion is granted.

(Whereupon, the jurors in the court room were sworn as to their qualifications and a jury was selected and sworn to try the case.)

(Whereupon, counsel approached the Bench for a brief conference.)

The Court: Now gentlemen, there is this matter of the counties, as you just explained, that it is satisfactory to all counsel to let the testimony be submitted by the counties first. The question I have in mind is this: Were it not for that fact, I would proceed to read the stipulation to the jury [41] which has been entered into as between the government and The Washington Water Power Company and the other defendants. The purpose of having the counties testify first is that the county officials may go back home and attend to their official business, and I am wondering whether it would not be just as satisfactory to let them go on first and get them out and then you may make your opening statement and I will read the stipulation and go on with the case.

Mr. Keith: The government will stipulate that that is agreeable with us.

Mr. Paine: Yes, that is agreeable. [42]

W. R. HALL,

being first duly sworn, was examined and testified as a witness on behalf of Ferry County as follows:

Direct Examination

By the Court:

Q. Your name is W. R. Hall? A. Yes.

Q. Where do you live, Mr. Hall?

A. Republic.

Q. And you are an official of what county?

A. Ferry County Assessor.

Mr. Noble: Q. Were you Ferry County Assessor on the first day of January, 1939?

A. Yes, sir.

Q. At that time did you fix values as assessor for tax purposes on certain lands in Section 11, Township 36, Range 37, EWM.?

A. Yes, sir.

Mr. Keith: Just a moment. I object to that question on the ground that unless he is testifying as to some positive physical act on his part that the question asked would call for a conclusion on the part of the witness.

The Court: Objection overruled.

Mr. Noble: Q. You did this work yourself, Mr. Hall? A. Yes.

Q. And at the time you did this did you prepare any sheets or record at that time?

A. Yes, our detail sheets.

Q. Do you know those valuations at this time?

(Testimony of W. R. Hall)

A. Yes.

Q. Do they show on your detail sheets?

A. Yes.

Q. And those were the sheets that you made?

A. Yes, sir.

Q. Will you state what those valuations were, Mr. Hall.

Mr. Keith: As to what property, please?

Mr. Noble: The land in controversy in this case. I can get the complaint and read it, if you wish. I will withdraw that question for the time being.

(Q) Mr. Hall, at the time you assessed that land was there more than one sub-division of that particular section assessed in a body?

A. I assessed it as Lots 1, 2 and 6.

Q. This land was in Section 11, Township 36 North, Range 37, EWM. What description have you on your detail sheets?

A. I have Lots 1, 2 and 6, Section 11, Township 36 North, Range 37, EWM, containing 134.8 acres.

Q. And what was the amount of the assessment at that time?

A. Twenty-five thousand dollars.

Q. Have you got a certified copy of your detail sheets there?

A. Yes, sir (sheets produced).

Mr. Noble: (Addressing the clerk) Will you mark that, please. (Exhibit marked "Ferry County's Exhibit 1 for identification.)

(Testimony of W. R. Hall)

Mr. Noble: At this time I offer this certified copy in evidence.

Mr. Keith: May it please the Court, for the time being I want to object to the introduction of the exhibit on the ground that it is not established by this identification, by [44] the testimony of the witness, that the assessment which this purports to cover is upon the lands which are the subject of this litigation.

The Court: He has testified it is the assessment of Lots 1, 2 and 6, Section 11, Township 36 North, Range 37, East of the Willamette Meridian, Ferry County.

Mr. Noble: If Your Honor please, this was the assessment of all of the land. At that time the taking hadn't taken place and it was all assessed in one body and the next exhibit will show the particular tract eliminated that was taken, but the lien attached before there was any taking or before there was any claim filed or any petition filed in this action, and that is the particular lien that is in controversy for taxes at that time.

The Court: I don't see how, when you have a tract of land that has been assessed as a whole and the question of the time of the attachment of the lien is made, how they could prove their case in any other way than by putting in, as they are trying to do, first, the full assessment and then segregate later, but the segregation came after the declaration of taking, as I understood it. Conse-

(Testimony of W. R. Hall)

quently, in order to get it back to the time that is important, I think they will have to put in the whole assessment.

Mr. Keith: If there will be a segregation later I will withdraw the objection.

The Court: The exhibit is admitted.

Whereupon, a Ferry County Assessment Sheet, marked for identification Ferry County's Exhibit 1, was received and admitted in evidence and is hereto attached and made a part hereof. [45]

Mr. Noble: Q. Mr. Hall, subsequent to January 1, 1939, you received a copy of a declaration of taking and a complaint entitled United States vs. The Washington Water Power Company and others wherein this same property, the title to this property was affected?

A. Yes, that was filed in the auditor's office.

Q. And subsequent to the declaration of taking, did you receive any plats from the Department of Reclamation or other source or any record showing the amount that was taken?

A. Yes, I received the maps from the Bureau of Reclamation.

Q. And using that map did you make any segregation of this particular property subsequent to that time? A. Yes.

Q. And as a result of that did you prepare for the following year a detail sheet? A. Yes.

(Testimony of W. R. Hall)

Q. Have you that detail sheet with you showing the inclusion of this particular property?

A. Yes.

Q. And is it properly certified? A. Yes.

Q. And what valuation did you fix on the property remaining? A. Four hundred dollars.

Mr. Noble: I will ask to have this marked Defendant's Ferry County Exhibit No. 2. (Q) Mr. Hall, how did you reach your basis of assessment that year?

A. On this one over here (witness referring to Exhibit 2)?

Q. Yes. [46]

A. As Just the ordinary grazing land with scattering timber.

Q. This detail sheet shows the amount still retained by The Washington Water Power Company?

A. Yes, ninety and some-odd acres.

Q. And in 1940, January 1, 1940, no detail sheet was made up on the other tract?

A. No. That was after.

Q. That was subsequent to the taking?

Mr. Noble: I ask to have this introduced as Defendant Ferry County's Exhibit No. 2.

The Court: Any objection?

Mr. Keith: No objection.

The Court: It may be admitted.

Whereupon, a Detail Assessment Sheet marked for identification Ferry County's Ex-

(Testimony of W. R. Hall)

hibit No. 2, was received and admitted in evidence and is hereto attached and made a part hereof.

Mr. Noble: That is all. You may cross-examine.

Cross Examination

By Mr. Stoutemyer:

Q. Mr. Hall, in your assessment of this land did you take into consideration an assumed value for power site purposes?

A. In the first one, yes, sir.

Q. And if it did not have any such value for power site purposes would your assessment have been anywhere near as high as—

Mr. Noble: If Your Honor please, I object at this time to the question for the simple reason that after the time for [47] equalization has gone by the assessments are fixed and there was no appeal from that assessment and there was no action brought here for the reduction of the taxes.

The Court: I will hear from you, Mr. Stoutemyer.

Mr. Stoutemyer: We are not questioning the amount of taxes but to letting the question of assessed valuation go to the jury when that assessed valuation was for an assumed value which does not exist.

The Court: Well, isn't this the situation? You haven't any right to attack the assessment in these proceedings. Furthermore, won't I be compelled when

(Testimony of W. R. Hall)

I get all through to hold that the assessed value is not a measure by which the amount of compensation is to be determined and consequently you can't be harmed by it. It is one of these instances where testimony is necessarily incidental only for the county to prove the amount of their assessments.

Mr. Stoutemyer: With that understanding, that the jury will be instructed that the assessed valuation has nothing to do with the verdict that they should render in this case, I would withdraw the objection.

The Court: I am not going into any——

Mr. Herman: Your Honor, I am not sure that Mr. Stoutemyer understood Your Honor's statement. I am not sure that that would be the proper instruction to give, that the assessed valuation would have nothing to do with the value to be placed in this case.

The Court: Well, it is my understanding that it is customary to instruct juries in condemnation cases that the assessed value is not to be considered as any measure. It is my present understanding of the law that if Mr. Hall was [48] called as a witness to prove the value of it in your case that I would sustain the objection to the testimony. However, if you don't agree with that theory, maybe Mr. Stoutemyer better be permitted to go ahead with the understanding that he is trying now a question between the government and The Washington Water Power Company and not a question be-

(Testimony of W. R. Hall)

tween the government and Ferry County, because he can't raise that issue against the county.

Mr. Herman: Probably, as far as this case is concerned, it is probably primarily a question between the government and the county, and that being so we will not at this time make any objection to the conditions under which it is admitted.

The Court: I will sustain the objection. Any further questions, Mr. Stoutemyer?

Mr. Stoutemyer: No further.

Witness Excused

L. J. O'CONNELL,

called and sworn as a witness on behalf of the Defendant Ferry County, testified as follows:

Direct Examination

The Court: Q. Your name is L. J. O'Connell?

A. Yes, sir.

Q. Where do you live, Mr. O'Connell?

A. Republic.

Q. And what is your business?

A. County Treasurer, Ferry County.

Mr. Noble: Q. How long have you been County Treasurer, Mr. O'Connell?

A. Since about the 15th of January, 1939. [49]

Q. Mr. O'Connell, it is one of your duties to collect taxes? A. Yes, sir.

(Testimony of L. J. O'Connell)

Q. Mr. O'Connell, are you familiar with the land in controversy here, being land in Lots 1, 2, 3 and 6, I believe, in Section 11, Township 36, Range 37? Am I correct in that, known as The Washington Water Power Company land?

A. Yes. I think it is Lots 1, 2 and 6. You had an extra one in there.

Q. Have you any record of the taxes paid there?

A. Yes, sir.

Q. For the year 1939, being what is known as the 1940 tax? A. Yes, sir.

Q. How were those rolls certified to you for the year 1940, the 1940 tax, being the assessment for 1939?

A. Well, they were assessed against The Washington Water Power Company in the total amount of 134.8 acres of unimproved land valued at \$25,000 and located in School District 9, Road District 2, with a total tax of \$1,050 and a fire patrol tax, \$4.38, total tax, \$1,054.38.

Q. Were those taxes or any part of them ever paid, Mr. O'Connell?

A. They were paid—Part of them were paid in 1941, this year, 1941.

Q. And what part of that tax was paid, Mr. O'Connell?

A. The taxes were paid by The Washington Water Power Company on part of Lots 1, 2 and 6, being 90.57 acres, a total tax of \$13.60 and the

(Testimony of L. J. O'Connell)

fire patrol tax of \$4.38, leaving a balance due and unpaid Ferry County.

Q. In what sum? [50]

A. Something over a thousand dollars, I believe.

Q. Do your figures show there the amount—
1033, or whatever it is? A. It doesn't show—

The Court: Doesn't it show the total?

Mr. Noble: Q. What was the total tax assessed for that particular year?

A. For 1040 or '41?

Q. The 1940 tax.

A. One thousand fifty dollars and the fire patrol tax of \$4.38.

Q. And what part of that was paid?

A. Thirteen dollars and sixty cents and the fire tax, \$4.38.

Q. Leaving a balance of approximately what—
\$1033? A. About that, yes.

Q. Have you a certified copy of your assessment sheet for the years 1939 or '40, or your tax rolls for '40 and '41? A. Yes, sir.

Q. Will you give me the 1939. (Done)

Mr. Noble: (Counsel addressing clerk) Will you mark this for identification. (Exhibit marked Defendant Ferry County's Exhibit 3 for identification.)

The Court: One thousand forty-six dollars and forty cents? Is that right?

Mr. Keith: That is what I figure.

(Testimony of L. J. O'Connell)

Mr. Noble: Q. This is a copy of your 1941 tax roll? A. Yes, sir.

Mr. Noble: At this time we offer this in evidence, Your Honor, that is, Defendant's Exhibit 3, Defendant Ferry County's [51] Exhibit, showing the tax roll for the year 1939, for the 1940 tax assessed in 1939.

The Court: Any objection?

Mr. Keith: No.

The Court: It will be admitted.

Whereupon, a Tax Roll, marked for identification Defendant Ferry County's Exhibit No. 3, was received and admitted in evidence and is hereto attached and made a part hereof.

Mr. Noble: At this time we offer in evidence Ferry County's Exhibit No. 4, showing the apportionment of taxes and so forth and the amount paid.

Mr. Keith: No objection.

The Court: It will be admitted.

Whereupon, the exhibit showing the taxes paid, marked Defendant Ferry County's Exhibit No. 4, was received and admitted in evidence and is hereto attached and made a part hereof.

Mr. Noble: At the time those taxes were paid, did you issue a receipt for them? A. Yes, sir.

Q. At that particular time of year the 1939 taxes had become delinquent taxes?

(Testimony of L. J. O'Connell)

A. Yes, sir.

Q. Have you a certified copy of that receipt there, Mr. O'Connell? A. Yes, sir.

Q. Showing the amount paid by The Washington Water Power Company? A. Yes, sir. [52]

Q. What amount does it show they paid at the time they paid it, including interest?

A. They paid a tax of \$16.80, \$4.38 fire patrol, and \$1.34 interest, a total of \$22.52.

Q. And what date was that paid?

A. April 21, 1941.

Mr. Noble: (Counsel addressing clerk) I wish you would mark that.

(Certified copy of tax receipt was marked Defendant Ferry County's Exhibit 5.)

Mr. Noble: Q. No payment other than those you have receipted have been paid on the taxes assessed in 1939, other than those shown by those receipts? A. No, sir.

Mr. Noble: That is all.

The Court: Any objection?

Mr. Keith: No.

The Court: Exhibit No. 5 is admitted.

Whereupon, the Certified Copy of Tax Receipt, marked Defendant Ferry County's Exhibit 5, was received and admitted in evidence and is hereto attached and made a part hereof.

Mr. Paine: May I ask a question? (Q.) As I understand you, Mr. O'Connell, the total tax on

(Testimony of L. J. O'Connell)

this property before any filing of declaration of taking by the government, which was the entire uplands of Lots 1, 2 and 6, was \$1050?

A. Yes, sir.

Q. Then after the filing of the condemnation proceedings and the acquisition of title by the government, there was a segregation made in the tax on the two parcels of land? Is [53] that right?

A. Yes, sir.

Q. And the tax remaining on the portion of the land not taken by the government was \$13.60? Is that right?

A. Yes, sir.

Q. Plus the fire tax?

A. Yes, \$16.00 and whatever it is there on the receipt.

Q. And that subsequently was paid by The Washington Water Power Company?

A. Yes, sir.

Q. And what you are talking about, this figure of \$1036.40, was the segregated part of the tax levied against the property which has been submerged and taken by the government?

A. Yes, sir.

The Court: Any questions, Mr. Keith or Mr. Stoutemyer?

Mr. Stoutemyer: No questions.

Mr. Noble: That is all. That is Ferry County's case, Your Honor. [54]

DEFENDANT STEVENS COUNTY'S
CASE IN CHIEF

CHESTER A. HILLS,

called and sworn as a witness on behalf of the Defendant Stevens County, testified as follows:

Direct Examination

The Court: Q. Your name, please.

A. Chester A. Hills.

Q. Where do you live?

A. I live at Colville.

Q. What is your official position, please?

A. Stevens County Assessor.

Mr. Grinstead: Q. How long have you been Assessor of Stevens County?

A. Nearly seven years.

Q. How long have you been connected with the Assessor's office? A. Since 1924.

Q. As such Assessor you are charged with making assessments on real and personal property of Stevens County? A. Yes, sir.

Q. You did that in 1939? A. Yes, sir.

Q. You are acquainted with the land in Sections 11, 12, 13 and 14, Township 36 North, Range 37, EWM., owned by The Washington Water Power Company? A. Yes, I am.

Q. You made the assessment on those lands in 1939? A. I did, yes.

Q. And extended the tax rolls? [55]

A. Yes, sir.

(Testimony of Chester A. Hills)

Q. After December 9, 1939, was there a segregation of the uplands and the taxes assessed upon those lands? A. Yes, sir.

Q. Why was that made, Mr. Hills?

A. This certificate of taking was filed with the auditor and then they requested a segregation of the uplands.

Q. On what basis did you make that segregation?

A. On the map furnished by the Bureau of Reclamation.

Q. And that segregation included in one part the land that was taken in this order of condemnation within the basin of the Columbia dam project?

A. Yes.

Q. And on the other the lands outside of that that were still retained by The Washington Water Power Company? A. Yes.

Q. Have you made a copy from the tax rolls showing the description of the land, the amount segregated as to valuation and taxes, respectively, between The Washington Water Power Company and the part taken in this order of appropriation?

A. Yes.

Q. You may state what that is, Mr. Hills.

A. This segregated the value between the land taken by the Reclamation Bureau and what remained to The Washington Water Power Company.

Q. That is taken from the tax rolls of Stevens County, is it? A. Yes.

(Testimony of Chester A. Hills)

Q. And it is certified to by you as County Assessor [56]

A. Yes, sir.

Mr. Stoutemyer: We have no objection to the showing as to the amount of taxes. That, we think, is the only part of this exhibit that is material and we do object to the showing of a valuation for the reason that it includes elements which are not proper for consideration and because the assessment is not proper evidence at all as to its valuation.

The Court: On the same basis as I overruled the objection on the matter of the defendant represented by Mr. Noble, I will overrule your objection and it may be admitted.

Mr. Grinstead: We offer Stevens County's Exhibit No. 1.

The Court: Admitted.

Whereupon, a segregation of the assessed values of land assessed to The Washington Water Power Company, marked for identification Stevens County's Exhibit No. 1, was received and admitted in evidence and is hereto attached and made a part hereof.

Cross Examination

By Mr. Stoutemyer:

Q. Is your estimate of the valuation on this land made on the supposition that the land was valuable for dam site or power site purposes?

A. Yes, on the portion there that was taken by

(Testimony of Chester A. Hills)

the Reclamation. Of course, in the first assessment it was all included together.

Q. But that first assessment was valued on the supposition that it had value for dam site and power site purposes? A. Yes.

Q. And if it did not have such value your assessment would have been very much lower, would it not? [57] A. Yes.

Mr. Stoutemyer: That is all.

Mr. Paine: Q. You made the assessment yourself?

A. Well, in some instances I tell the deputies.

Q. Yes, but under control of your office?

A. Yes.

Q. And these figures are on the basis as required by law, fifty per cent of the real value, are they not? A. Supposed to be.

Q. And under the law you are sworn to assess the property at a figure that in your judgment represented its real and true value—fifty per cent of its real and true value, weren't you?

A. Yes, sir.

Q. You attempted to do that? A. Yes, sir.

Q. You have been familiar with that land up there for a great many years, haven't you?

A. Yes, sir.

Q. It has been assessed on the basis of having a market value for power site purposes during all of that time, hasn't it? A. Yes.

Mr. Paine: That is all.

Mr. Grinstead: That is all, Mr. Hills. [58]

MIRIAM MILLER,

being first duly sworn was called as a witness on behalf of the Defendant Stevens County and testified as follows:

Direct Examination

The Court: Q. Your name is Miriam Miller?

A. Yes, sir.

Q. Is it Miss Miller or Mrs. Miller?

A. Miss Miller.

Q. And where do you live? A. Colville.

Q. And your occupation?

A. My occupation is deputy treasurer.

Mr. Grinstead: Q. How long have you been connected with the treasurer's office?

A. I have been connected in Stevens County since the 13th of May, 1935.

Q. I believe before that time you were with the treasurer's office somewhere else?

A. Yes, I was, in Okanogan County.

Q. You are familiar with the tax rolls of Stevens County? A. Yes, sir.

Q. And with the rolls covering Sections 11, 12, 13 and 14, Township 36 North, Range 37, EWM., formerly owned by The Washington Water Power Company? A. Yes, sir.

Q. I believe you prepared a statement—You know about a segregation of uplands and taxes that was made upon that land after the 9th day of December, 1939? A. Yes, sir. [59]

(Testimony of Miriam Miller)

Q. And I believe you have made a statement of those aggregations and values as to taxes?

A. As to taxes, yes, sir.

Q. You may state what that shows, Miss Miller.

A. This is a copy of the 1940 taxes that were due and delinquent and unpaid at this time against land owned by The Washington Water Power Company in Sections 11, 12, 13 and 14, Township 36 North, Range 37, together with the interest figured up to date and the outstanding fire patrol tax, and it also shows the amount paid by The Washington Water Power Company on property in the same section, property in the same section that they retained and on which they paid the taxes.

Q. The first item of delinquent taxes is the lands that were segregated as coming within this order of condemnation?

A. Yes, sir.

Q. And the latter amounts cover the land that The Washington Water Power Company retained and on which they paid the taxes?

A. Yes, sir.

Q. You certify these as Deputy County Treasurer as being a true and correct copy of the rolls?

A. Yes, sir.

The Court: Any objection?

Mr. Keith: No objection.

The Court: Mr. Grinstead, will you tell me how much the tax on the portion that comes under the Reclamation is?

Mr. Grinstead: As shown by this statement?

(Testimony of Miriam Miller)

The Court: Yes.

Mr. Grinstead: The delinquent tax is \$1949.14. There [60] is \$1.62 forest patrol, and as Miss Miller has stated, the interest computed up until today is \$203.18, making a total of \$2,153.94.

Mr. Paine: That is all.

Mr. Grinstead: At this time I wish to thank the Court and counsel here for extending us the courtesy or permitting us to put on our testimony at this time and permitting us to get away.

The Court: Now, when are you going to argue the legal questions involved in your aspect of it?

(Brief discussion on this point omitted)

Mr. Noble: Very well, we can be here tomorrow morning or any time suitable to the rest of them.

(Further discussion on same point omitted)

The Court: Well, come back in the morning and argue this thing out and we may as well get it out of the way.

(Whereupon, the jury was excused until 10:00 A. M. on September 16, 1941, and the case was adjourned until 9:30 A. M. on September 16, 1941, when the tax question was argued by counsel, at the conclusion of which the following comment was made by the Court:)

The Court: Mr. Noble and Mr. Grinstead, if in going into this matter I believe that you should have

opportunity for further argument, I will notify you. I am not agreeing that under all circumstances that if I should find the counties were not entitled to recover I will notify you, but if any matters should come up in this case—if after reading again the cases that Mr. Noble cited, I believe you would care to have further notice to argue I will notify you.

Mr. Noble: Very well, Your Honor.

The Court: We will get the matter out of the way at the present time. [61]

(Whereupon, the jury was brought in and the following proceedings were had:)

The Court: Gentlemen of the jury, those of you who served last week in the case of *Berry vs. The Great Northern Railway Company* will remember that I explained the use in the new rules of Federal procedure for pre-trial procedure. For the benefit of those who didn't serve on that case I will go into the matter again. In 1938, as a result of a considerable expenditure of time and effort by a committee appointed by the Supreme Court of the United States, there was presented to the Congress a new set of rules for Federal procedure and those rules became effective at the adjournment of Congress of that year. The purpose of the adoption of the rules was the expediting of business in Federal court. Among the rules was Rule 16, which gave to the Court the power to call in all of the counsel and the parties in various cases and to require of them to discuss all the issues in the case,

the purpose being to shorten the time of trial, to eliminate from trial all arguments about issues which are really not in controversy, and to enable the jury and the Court to decide the cases purely upon those issues which were in controversy. Now, those rules are not applicable in cases such as this, condemnation cases. Several months ago I asked counsel in this case to come in and discussed with them the possibility of stipulating, and even though this was a condemnation case that they try to work out a pre-trial arrangement among them, and counsel on both sides were very cooperative and as a result a stipulation has been worked out and signed by the parties which I think unquestionably will shorten this trial by at least two weeks, and the [62] first thing I want to do in the case is read to you this stipulation. This stipulation is a part of the file and if from time to time during the course of the trial you should, as individuals, want me to re-read portions of this stipulation, don't hesitate to express that desire. It is long and you can't be expected to carry all of it in your minds at all times during the trial.

(Stipulation dated July 2, 1941 which appears at page 43 of this record on appeal read to the jury)

The Court: Dated July 2, 1941 and signed by all the attorneys.

Mr. Stoutemyer: I suggest at this time that there is also another stipulation on file in which the par-

ties have agreed to the value of the Hummel tract.

Mr. Keith: That has not been filed yet.

The Court: Mr. Keith said yesterday it just got back into his office yesterday.

Mr. Keith: Yes, it did. It may be filed at the present time. However, I think there are two stipulations, one between The Washington Water Power Company and the plaintiff and one between Lillian C. Hummel and the plaintiff.

The Court: This one between the plaintiff and The Washington Water Power Company reads as follows:

(Stipulation dated August 21, 1941 which appears at page 55 of this record on appeal read to the jury)

The Court: Dated August 21, 1941 and signed by all of the attorneys. Isn't that sufficient, so far as reading to the jury is concerned? The other stipulation is between Mrs. Hummel and the Government and is to the effect merely—In addition to the stipulation signed by The Washington Water Power Company——

Mr. Keith: Merely an agreement by her that the value deposited is the true value.

The Court: I won't read that one. [63]

(The Court omitted reading the following stipulation:)

“It is hereby stipulated and agreed by and between petitioner, United States of America, and the defendant Lillian C. Hummel as follows:

(1) That the petitioner herein on December 9, 1939 filed its petition for condemnation of the certain premises, easements and rights therein described.

(2) That on December 9, 1939, the petitioner filed a declaration of taking vesting title to the certain premises, easements and rights described in the petition in the United States of America and judgment on declaration of taking was entered and adjudged in the above entitled court on December 9, 1939.

(3) That included in the lands the title to which was acquired by the petitioner in the above entitled proceedings is the following described tract situated in the County of Stevens, State of Washington, to-wit:

Tract No. 2

(Hummel Tract)

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13), which point bears North 86°09'57" east 2568.16 feet and North 03°38'34" West 247.27 feet from the quarter section cor-

ner on the west line of said Section thirteen (13); running thence North $64^{\circ}49'10''$ West 95.80 feet; thence North $74^{\circ}52'50''$ West 393.47 feet; thence North $63^{\circ}23'20''$ West 522.80 feet; thence North $33^{\circ}14'50''$ West 307.77 feet; thence North $26^{\circ}06'00''$ West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence north $85^{\circ}45'25''$ East 1197.80 feet to the northeast corner of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13); thence south $03^{\circ}38'34''$ East 1105.80 feet along the east line of the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13) to the point of beginning.

(4) That the tract described in Paragraph 3 above on the date of the taking was owned by the defendant Lillian C. Hummel, a spinster; that the estimated fair market value of the said tract was \$241.35; and that said amount was deposited with the Clerk of the above-entitled court by the petitioner as com- [64] pensation for the taking of said premises.

(5) That the United States has a right to condemn said premises for the purposes set out in said petition.

(6) That the fair market value of said premises together with any and all damages

which have been sustained or may be sustained by all persons whatsoever by reason of the condemnation and taking thereof by the United States is the sum of Two Hundred Forty one and 35/100 Dollars (\$241.35).

(7) That judgment shall be entered herein pursuant to the provisions of the statutes of the United States and of the State of Washington, where followed by conformity, ascertaining and establishing that the compensation to be paid by the United States of America in the above-entitled action for the condemnation and taking of the above-described premises shall be in amount set forth in the preceding paragraph hereof.

(8) That a judgment of condemnation shall be entered herein as to said premises and as to the ownership of said premises by the defendant Lillian C. Hummel, a spinster, adjudging that the public use requires the condemnation thereof, confirming the title of the United States in fee simple thereto and releasing the United States from any other and further liability on account of the condemnation and taking of said premises.

(9) That the said judgment shall provide that no clerk's fees, commission or poundage shall be charged upon or against said award or any part thereof; that no interest shall be allowed on the amount of such award, either before or after the date of such judgment.

(10) That a judgment shall be entered herein directing the payment of Two Hundred Forty-One and 35/100 Dollars (\$241.35) to the defendant Lillian C. Hummel, a spinster, less unpaid [65] taxes, if any.

Dated this 10th day of August, 1941."

(Whereupon, Mr. Stoutemyer made an opening statement to the jury on behalf of the United States, after which the following proceedings were had:)

The Court: Do you care to make a statement, Mr. Paine?

Mr. Paine: I would like to reserve our statement until the close of the Government's case.

(Whereupon, counsel for Ferry County and Stevens County were excused from further attendance.)

Mr. Stoutemyer: As the Court knows from my statement to the jury, we consider that the material facts, with possibly one or two points of minor importance, have been fully determined by the stipulation. The two points which I have in mind I think possibly counsel will agree to, and thus eliminate the time which would be required in offering evidence on them. The first is that the Grand Coulee Dam will improve navigation on the Columbia River to a very substantial extent. The stipulation does not quite cover that point.

The Court: No. I noticed that since we had our meeting the other day. The stipulation in Paragraph 2, it is stipulated the Columbia River is a navigable stream, and in Paragraph 11, "that the plaintiff has the right to condemn the said land for the purposes named in the complaint." Now, the purposes named in the complaint are navigation, flood control and so forth. There is nothing in the stipulation to the effect that this dam would effectuate the purposes named in this complaint and it seems to me that that is an issue which still remains open under the stipulation, unless counsel wants to [66] further stipulate.

Mr. Stoutemyer: We are prepared to prove that unless counsel is willing to agree that that is true.

Mr. Paine: Well, our position, if the Court please, on that is, that it is wholly immaterial and irrelevant to this case, under the doctrine laid down in the Monongahela Navigation Company against the United States, that there it was stipulated that the United States had the right to acquire his property by eminent domain proceedings it doesn't make any difference whether they are taking it to build a post office on it or overflow it or build a post road, as they point out in the Monongahela case, or whether they take it to improve a navigable highway such as a navigable river.

The Court: Then you are not willing to stipulate?

Mr. Paine: No, Your Honor.

Mr. Stoutemyer: I will call Mr. Banks.

PLAINTIFF'S CASE IN CHIEF

FRANK A. BANKS,

being first duly sworn, was called as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

The Court: Q. Your name is Frank A. Banks?

A. Yes, sir.

Q. Where do you live, Mr. Banks?

A. Coulee Dam, Washington.

Q. And your position, please?

A. Supervising Engineer for the United States Bureau of Reclamation, in charge of the construction of Grand Coulee Dam. [67]

Mr. Stoutemyer: Q. How long have you been in charge of the construction of the Grand Coulee Dam?

A. Since August 1, 1933, when the work started.

Q. Are you familiar with the plans of that dam and with the construction of the dam?

A. I am.

Q. Do you know what the effect of that dam will be in regard to backing up the water of the Columbia River, storing the flood water, and what the effect of the release of that flood water will be on navigation below the dam?

Mr. Paine: Now if Your Honor please, for the record, at this time I object to this question as being incompetent, irrelevant and immaterial to the sole issue in this case, as I see it, which is, what is

(Testimony of Frank A. Banks)

the just compensation to be paid for the lands of the Washington Water Power Company.

The Court: Objection overruled, exception allowed.

Mr. Paine: Exception, please. I understand that probably the new Federal Court rules don't apply to this eminent domain proceeding.

The Court: I am afraid not.

Mr. Paine: I don't want to irritate Your Honor by taking exceptions, but I think probably the new rules don't apply to this sort of proceedings and in the record we are going to have to try to remember each time to except to each legal ruling.

The Court: Yes. In order to be safe I assume you will have to do that. I wish we could all stipulate between ourselves that it would not be necessary to take exceptions but I guess that could not be done.

Mr. Paine: Yes. I wish we could do it because it is something that is easy to forget. [68]

Mr. Keith: The Government would be willing to make such a stipulation.

The Court: I wouldn't even ask counsel to do it because I am afraid the circuit court might say that could not be done.

Mr. Paine: So the record shows our exception?

The Court: Yes.

Mr. Stoutemyer: I presume you will agree the record may show that Mr. Banks is qualified as an engineer to answer the questions that I have asked him?

(Testimony of Frank A. Banks)

Mr. Paine: Yes, I will agree to that.

Mr. Stoutemyer: Q. Mr. Banks, what if any effect will the Grand Coulee Dam have in improving navigation on the Columbia River?

Mr. Paine: That is objected to on the same grounds.

The Court: Same ruling.

Mr. Paine: Exception.

A. It raises the water level at Grand Coulee about 355 feet and backs the water up the Columbia River to the Canadian border, a distance of about 151 miles and for a considerable distance up several of the tributaries. Furthermore, by storing the flood waters it improves to some extent the flood conditions on the river and releasing those flood waters during the low period of the river, the period of low flow, it raises the low water level of the river between Grand Coulee Dam and the mouth of the Snake River approximately four feet and between the mouth of the Snake River and Bonneville about two feet, thereby improving navigation to that extent.

Mr. Stoutemyer: Q. Does the backwater above the Coulee Dam create a navigable lake between the dam and the Canadian line? [69]

Mr. Paine: Objected to on the same grounds.

The Court: Objection overruled, exception allowed.

Mr. Paine: Exception.

A. It does.

(Testimony of Frank A. Banks)

Mr. Stoutemyer: Q. Is that lake navigable by steamboats of considerable capacity?

Mr. Paine: Objected to on the same grounds and the additional grounds that it doesn't make any difference about the size of the steamboats, but primarily on the ground stated.

The Court: I think there is materiality to the last part.

Mr. Stoutemyer: All right. We will withdraw that question. That is all.

Mr. Paine: No questions.

Witness Excused.

Mr. Stoutemyer: Now, the only other evidence we wish to present other than what has been agreed to in the stipulation is to offer in evidence as an exhibit one document, a copy of which we have filed with the clerk, which is a photostatic copy of the order made by the Federal Power Commission denying the application of The Washington Water Power Company for a license.

The Court: I will say this, Mr. Stoutemyer: As you know, we had an informal conference before you came over, last Friday, and both Mr. Keith and Mr. Paine and Judge Herman submitted a large number of authorities to me, which I have read. They indicated that that was going to be a question. I have a feeling that the question of the ad-

missibility at this time of that order is going to be so involved in the argument which I anticipate will be made at rather great length, that from my [70] reading of the cases I think it would be desirable from the point of view of both sides if I would reserve a ruling upon that question until after I have heard the argument upon the question of the admissibility of evidence as to power site value, and if there is no objection by either side, make your offer of proof and have Mr. Paine make his objections and I will then reserve ruling until after I have decided on the other question.

Mr. Stoutemyer: That will be agreeable.

The Court: You make an offer.

Mr. Stoutemyer: We make an offer.

Mr. Paine: I think he should get it out and have it identified for the sake of the record.

(Sealed document opened by Clerk and marked as Plaintiff's Exhibit A.)

Mr. Stoutemyer: We offer in evidence the document marked Plaintiff's Exhibit A.

Mr. Paine: To which defendants object on the ground it is incompetent, irrelevant and immaterial to the proof of the issue in the case, namely, the just compensation and the fair market value of this property on the date of the taking in this proceeding.

The Court: I will reserve the ruling until after I have decided the question of the admissibility of evidence on the value of the power site.

Mr. Stoutemyer: That will be the only evidence

that we will offer unless the Court should rule that testimony in regard to power site value is admissible, in which event we would have the privilege of meeting the claims of the defendant on that issue.

[71]

The Court: Plaintiff rests?

Mr. Stoutemyer: We rest.

The Court: Plaintiff rests subject to the right to reoffer Plaintiff's Exhibit "A" after the Court has ruled upon the admissibility of certain of defendants' testimony.

Plaintiff Rests.

Mr. Paine: Now, if Your Honor please, I am just wondering what might be the best method of procedure. I could make an extended opening statement to the jury here outlining a lot of our evidence, and of course, the question of the admissibility of that evidence is the primary legal question involved here. Wouldn't it be better perhaps to proceed at this time with the legal argument on the issues involved? I think Your Honor has them pretty well in mind but I can outline in that argument generally what is the character of the testimony we are going to present, and dispose of that legal question, and then if Your Honor holds one way we will have to put in testimony and will know what will be admissible. Then I can proceed to make my opening statement.

Mr. Stoutemyer: That will be satisfactory to us, if agreeable to the Court.

(Whereupon, the jury was admonished and excused until 9:30 A. M., on Monday, April 22, 1941, and a short recess was taken at this time, Tuesday, September 16, 1941, after which the following proceedings were had outside the hearing of the jury:)

[72]

OPENING STATEMENT OF DEFENDANT

The Court: When you made the suggestion about not making your opening statement, my first reaction was to say no, you should make an opening statement, because it seemed to me if you were asking me to pass upon the admissibility of evidence I should have a complete statement of what evidence you proposed to introduce. However, I realize that if you made an opening statement to the jury today and they didn't come back until Monday, with all due respect to you, they may have forgotten the things you said by Monday, so I decided right on the spur of the moment that I would ask you to make a rather complete statement now, such as you would have made to the jury, of your evidence and then if I rule that the evidence is admissible you can then make it to the jury.

Mr. Paine: Yes, I think that is a good idea. If Your Honor pleases, in compliance with Your Honor's request, I don't believe it will be necessary to go into the details in regard to the qualifications

of the witnesses and such matters that I would have gone into at length with the jury. What Your Honor wants, I assume, is a statement of the position of the company and the evidence that we propose to offer in regard to the value of these lands.

Now, as I conceive the issue, the sole question remaining is the question of the fair market value or the just compensation to be given The Washington Water Power Company for these lands. Our testimony will show that the tract of land involved here and as sought to be condemned by the Government, as appears from the stipulation, is a part of a larger tract of land located at Kettle Falls upon the Columbia River; that [73] these tracts sought to be condemned are what we refer to as the abutment lands or the critical lands in connection with the development of a power site; that due to their characteristics—and we will offer evidence, including maps, pictures and other evidence of that sort, of the nature of the lands themselves; that they consist of a rocky dike or dam, in effect, land stretching across the Columbia River at Kettle Falls made up of a quartzite formation rising rather precipitously on either side of the river and consisting of an island in the center of the river; that across these lands a power development can be readily constructed, all of which is contained in essence in the stipulation; that the nature of the soil, the rocky nature of the soil, is such that it is possible to develop the complete foundation for the building of the dam, the wings and abutment of which lie upon

our lands, the other portion of the dam extending out across the middle of the bed of the Columbia River.

We contend and we will offer evidence that all of the lands that we own are what in law are known as uplands or lands to which we have absolute fee title above the high water mark of the river. We are not contending, and I think Your Honor should have this in mind—we are not contending for any value or any ownership in the raw water of the river as such and the flow of the river as such. We are not contending that we have any vested or inherent right in the bed of the stream or in the flow of the river or that we have any legal ownership in the bed of the stream or in the flow of the river or that we have anything such as was referred to as a hypothetical additional value of the water power on the river. We do contend and will offer proof to show, as I say, that our lands were so situated in relation to the river that they afforded the proper place [74] and the feasible place for the location of a hydroelectric development and the abutments of a hydroelectric plant. We will show further, if Your Honor please, that these lands can be utilized by utilizing the flow of the river and the necessary uplands for over-flow lands at the site of the dam to create a hydroelectric development; that the enhanced market value of these lands has been recognized from the earliest time that the land came upon the market; that the land came upon the market first shortly after the Colville Indian Reser-

vation was opened up in 1906 to settlement or to taking by individuals; that the first sale of the land occurred shortly thereafter, in which the uplands involved in this proceeding were sold for \$80,000 on the market; that the lands were then sold again in 1912 to the Granby Company for use in developing a power site for \$100,000; that thereafter the lands were sold by the Granby Company to The Washington Water Power Company in 1921 for \$150,000.

The Court: This \$80,000 was in contemplation of a dam, was it?

Mr. Paine: The \$80,000 was the market price fixed by the seller, who was Mr. I. N. Peyton and another party who had individually taken the land up, and they were sold to Mr. J. P. Graves, who had in mind ultimately using the land for the development of a power site upon the Columbia River; that the sale to the Granby Company was made upon the basis of their potential value, of their use that could be made of them in developing a power site upon the Columbia River; and that the Granby Company held them for that purpose in connection with the development of their own copper-reducing plant that the Granby Company was operating; that they were then sold to the Washington Water Power Company for the purpose of utilizing [75] them as a power plant in connection with the electric distribution system of The Washington Water Power Company.

We will show, in other words, that private capital has been seeking these lands from the time that

they were first placed upon the market and has been seeking them because the value that they had as part of a developed hydroelectric system or development; that The Washington Water Power Company, after it acquired the titles to the land in 1921, proceeded at once to take the necessary steps to develop the use of this site and bring it into use as a hydroelectric development; that in order to make use of such a site it is necessary, of course, to obtain the right to use the bed of the stream, which under the laws of the State of Washington belongs to the State of Washington. It is necessary to secure the permits to appropriate the waters of the Columbia River from the State of Washington. It is also necessary to secure permission from the United States Government, through the Federal Power Commission, for authority to locate any hydroelectric development or construction of this sort in the stream; and it is necessary to secure ultimately the lands which will be overflowed by the backwater of the dam to create a reservoir for the dam; that the company at once proceeded to take the necessary steps to secure these various permissions to make the necessary development; that it filed at once with the Federal Power Commission an application for a preliminary permit to go ahead with this development; that this preliminary permit was granted by the Federal Power Commission, and that in pursuance of the granting of the preliminary permit the company proceeded to do core drilling, diamond drilling of its own lands to determine the

condition of the rock formation that would be necessary in the base of the [76] dam itself; that they did what is known as wash boring the various types, where the tubes are run down and wash boring is made to determine the depth of the foundation necessary for the construction of the dam; that they proceeded to make all of the necessary surveys for the backwater over-flow to determine where the lines of over-flow would come and the lands that it would be necessary to acquire to make the building of the dam feasible and not raise the water above the Canadian boundary, which was a limiting factor in the development of the dam.

We will show that in addition to that they went ahead with those various steps acquiring this information. They established gauging stations in the stream in order to ascertain the exact amount of flow of the river to figure the type of development of the dam and hydroelectric plant necessary to best utilize the total flow of the river at its high and low water stages; that in the process of doing these various things, from 1921 on, the company has made a total investment in the property, including the purchase of its land, of \$471,653.25 as an indication of the interest of the private power, private capital, in the development of these lands for power site purposes; that it took the necessary steps to secure the state lands; that agreements were made with the State Commissioner of Land for the purpose of securing all the right that the state had in the shore land of the Columbia River and a figure was agreed

upon of approximately \$29,000 for the purchase of the necessary state land; that appropriations of the water were filed with the State Supervisor of Hydraulics; that those appropriations of the waters of the Columbia River had priority over any other appropriations and no other appropriations having been made they were rated and given the necessary priority to use the [77] waters of the Columbia River.

That this activity extended over some considerable period of time; that during the process of development of the site the company also acquired its Chelan site involving Federal Reserve lands at Lake Chelan, and that the matter was taken up with the Federal Power Commission and in the interest of the type of development it was decided between the company and the Power Commission that the Chelan site, which was also a Federal license project, should proceed ahead of the development of the Kettle Falls site but that the Kettle Falls site application was kept in good standing and permitted to remain with all the priorities that it had in the files of the Federal Power Commission; that after development of the Chelan site we ran for a period into the depression and no activity was urged very strongly upon us by the Federal Power Commission towards the building of the Kettle Falls site, but after the depression began to wane in '34 and '35, the company then proceeded to file its application and secure all the necessary information for the Federal Power Commission.

At this time they urged upon us that the fullest development of the site be made, namely, that it be developed to secure a head which would back the water completely up to the Canadian boundary so that all of the fall of the river that could be developed from the Canadian boundary down to Kettle Falls should be developed and that a small project should not be put in that would then make it impossible to locate at any other point north of Kettle Falls below the boundary a plant to develop that additional head or make it impossible for the type of development at Kettle Falls to be expanded or put in an additional head at that point; that the requirements also [78] were that we should take into consideration navigation and provide for the installation of the necessary locks in the dam and the necessary fish ladders to take care of the fish;

That in accordance with their requests in this regard we did a great deal of work in determining the necessary height of the dam and the backwater, all of which was turned over to the Government for their use in connection with the Grand Coulee Dam's backwater and the gauging of the river; that actual estimates, specifications and drawings of the proposed hydroelectric development were made so that the company was ready at the time the property was taken to immediately start construction had not the Grand Coulee Dam been built and the property condemned by the Government.

Then in addition to proving that and the total

amount of the investment of the company in the property, we will offer evidence by competent engineers, qualified engineers who have been engaged for many years in the designing and construction of power projects of this type all over the United States, that, supplementing the stipulation, it is physically possible to construct a feasible and safe dam at Kettle Falls; the testimony of those engineers that such a construction of such a dam is practical from an economic standpoint; the estimates and specifications and drawings of the dam and the costs of the dam showing a preliminary cost to the first stage of the development of that dam of around eight and a half or nine or nine and a half million dollars, the higher stages around \$11,000,000 and the final stage bringing the total cost of the dam up to around \$31,000,000; that this power site, since it is the only one on the Columbia River that is adaptable to development in stages—by that I mean that the for- [79] mation of the land is such at Kettle Falls that you can put in what they call a low dam, a low head to the dam for around \$9,000,000 and develop the power at that point with that head of water; that then, without the necessity of reconstructing or tearing out that dam, it can be increased and raised by two more stages to get in the total ultimate and proper development of that site; that such a situation lends itself to commercial development by private capital very much more readily than the Grand Coulee type of construction or the type further on down the stream at Foster

Creek or any of these other sites where the dam must be constructed at the very beginning to its complete and ultimate development, which necessitates, of course, the outlay of a very materially larger amount of capital before the dam would be put into production and revenue from the sale of hydroelectric energy can be made to pay a return upon the investment; that the installation of the first units of the dam would cost, as I say, around nine and a half million dollars and that the kilowatt-hours to be developed will be at a cost of eighty-six dollars a kilowatt; that this eighty-six dollars a kilowatt is one of the cheapest costs of development or the cheapest price that could be gotten anywhere in the northwest.

That The Washington Water Power Company, due to the rapid increase in population and demand for power and the loads that can be expected in this territory, had reached a point where in 1937 to '39, beginning back in 1937, would have to make provisions for the obtaining of additional power for the supply of its system; that The Washington Water Power Company is interconnected with the other great power systems of this region, the Puget Sound Light and Power, the Idaho and the [80] Montana Power Company and the Pacific Power and Light Company; that the total demand for the interconnected system is such that private capital, especially The Washington Water Power Company, would at that time, but for the taking of the property by the Government in the construction of the

Grand Coulee Dam, have been ready to start upon the construction and would have started the construction of this dam site at Kettle Falls; that in addition to this, we will show that, in the Federal Power Act—the Federal Power Act provides for the licensing of projects upon rivers; provides for the ascertainment of the original costs of those projects, the actual investment that the company has in those projects, as a basis upon which the company can proceed to capitalize or to use their property; that the likelihood of the Federal Power Commission granting these licenses has been such in the past, where the developments have been sound financially and economically, that the owners of that type of property have had an enhanced market value in their property due to its adaptability for this type of development.

We will show, by offering proof here by competent witnesses, such as Mr. J. P. Graves, an expert who has lived in the territory since 1887, who has bought and sold numbers of power sites in this territory, who has been engaged in the construction of many industries and businesses which utilize electric energy; was engaged as director and president for a long time of the Granby Copper Company, which developed three sites in the territory; was head and the moving spirit of the old Spokane and Inland Railroad and bought the Nine Mile site upon the Spokane River; was instrumental in purchasing the site [81] of the present company's plant at Chelan, which is also a Federal licensed project and

includes Government lands, knows the values of power sites in this territory, even where located upon navigable streams and where the question of the necessity of securing a permit from the Federal Government is one of the elements that is taken into consideration between buyers and sellers. Not only is he familiar with these, but he is familiar with the Kettle Falls project in particular, having been one of the early owners of the property and sold it to the Granby Company, and he will place the fair market value of the property, in his opinion, the fair market value of the property on December 9, 1939, in the neighborhood of around half a million dollars. We will offer testimony of other experts, such as Mr. Shay of Wenatchee, who has been in this territory for a good many years. He is acting at this time as right-of-way agent or purchasing agent for the Puget Sound Light and Power Company and is familiar with this type of property. He will testify that he is familiar with the sale of properties involved at the Rock Island dam, which is a dam located upon the Columbia River directly south of Wenatchee in the State of Washington; that the land involved in that site, the uplands, which correspond to the land involved in this site, were purchased and sold upon the open market prior to the obtaining of any license from the Federal Power Commission to develop the site; that the total price paid for them was in the neighborhood of \$120,000 for the site itself; that the site, for agricultural purposes, is wholly valueless, con-

sisting of nothing but bare rock along the sides of the Columbia River and an island in the Columbia River, similar to the situation here; that he is familiar with the fair market value that would be [82] paid for uplands of this type, taking into consideration all of the factors which go to make up the probability or lack of probability that these lands could or could not be used for power site purposes; that they would command and would have commanded upon the market in December, 1939, prior to the taking of the property by the Grand Coulee, a fair market value close to half a million dollars. We will also have the testimony of other experts, Mr. M. O. Leighton of Washington, D. C., who is familiar with the purchasing of these types of power sites throughout the United States for power site lands. Power site values are recognized, even if the ownership of the water is conceded to be in the Government; that the Government itself recognized that type of value in properties located in its reserves or adjacent to its streams; that in his opinion, he is familiar with this site up here; that taking into consideration all of the things surrounding the situation as it exists that these lands had an actual fair market value on the market at about that time in the neighborhood of a half a million dollars or something of that nature, and that therefore the company is entitled to show the fair market value as near as you can in this type of a case by showing the fact that the site itself is adaptable; that the development is one of great

value; that if you owned the power and everything in fee, absolutely apart—if you could obtain private ownership of it—that value would probably be in the neighborhood of about \$3,000,000, and without that ownership and the fact that you only have here your abutting lands, that you have to capitalize your abutting lands in the Federal license, which is part of the proceeding by which you acquire the site, apart from any hypothetical value or any additional value that it may [83] have; that in order to award us just compensation we are entitled to have whatever the jury finds, taking all of those facts into consideration, was the fair market value of those uplands, exclusive of the right to use the river but taking into consideration all of the facts in regard to it. Now, I could give you more in detail the qualifications of the witnesses as engineers, more in detail the specific facts in regard to the amount of power that could be developed, the cheapness with which it could be sold and how it could be applied as we intended to into the system of The Washington Water Power Company, but I don't think that is what Your Honor has particularly in mind. That all goes really to the amount of the award rather than to the fundamental question of whether we are entitled to show to the jury at all that this type of property has that value upon the market, as represented both by our investment in it and by the prices that it could have been sold and transferred for if it hadn't been taken by condemnation.

The Court: All right.

Mr. Paine: In addition to that, we will have, as Judge Herman reminds me, testimony to show that negotiations were had; that the reservoir land could be readily acquired, and we have already stipulated as to the amount of money that would be required to acquire those reserve lands—I think \$3,000,000. We will show also by Mr. Kinsey Robinson, president of the company, that the company was in such financial condition, representing a total valuation of the company around seventy million or seventy-five million dollars, that the company had refinanced its mortgage bonds in the spring of 1939 that it had available and could readily have obtained by the sale of bonds and by the loaning of money from its parent companies the necessary [84] capital to have proceeded with the development, and that the over-flow land could readily have been obtained; that we obtained the over-flow lands of Coeur d'Alene Lake and Lake Chelan, where there were many more different parcels of land, and there were no obstacles in obtaining the over-flow lands that were appropriated, and the building of this site is practical from a feasible and economic viewpoint.

(Brief statement by Court as to the time to be devoted to argument omitted.)

The Court: All right, Mr. Stoutemyer.

Mr. Stoutemyer: Counsel for the defendant has suggested that we take the opening argument and we have no objection to doing so.

Mr. Paine: I thought really that that was proper, that this would come up in the form of an objection to the first question that I would ask the witness.

The Court: All right.

(Whereupon, Mr. Stoutemyer, on behalf of the Plaintiff, argued on the question of the admissibility of evidence as to the value of the property as a power site and so forth, at the conclusion of which an adjournment was taken until Wednesday morning, September 17, 1941, when the same questions were argued by Mr. Paine on behalf of the defendant. At 12:30 P. M., the trial was adjourned until Thursday morning, September 18, 1941, at 9:30 A. M., when the argument by counsel was continued, concluding with argument by counsel on the question of who must pay the taxes due Ferry County and Stevens County, on which issue the Court made the following [85] comment:)

The Court: It seems to me there is only one question involved in this tax matter and that is whether or not the counties here, having been brought in, are entitled to recover their taxes. Clearly, the United States Government has to pay them if anybody has to pay them. . . . There is no question under the statute that there is a valid lien. There is no question under the statute as between the purchaser and seller. If you acquire a property before the 15th of February, then the purchaser has to pay. There is no question but what if the Government hadn't brought these people in they couldn't go into court and sue you, as the Chief Justice

pointed out in the Alabama case. The question is here whether or not, because you have brought them into this case and brought them in before the Court, whether or not they are entitled to assert their claim more than if they had not been brought into this case. . . . You are condemning property under the laws of the State of Washington and the laws of the State of Washington say if you acquire a piece of property prior to February and there are taxes due on it, taxes levied against it, that the purchaser pays the taxes, and if I go out and buy a piece of property and I buy it before the time, then I pay; if I buy it after the time, then the seller pays. . . . I will instruct the jury, then, to return a verdict in favor of the county against the Government for the amount they claim.

(Whereupon, the case was adjourned until 9:30 A. M., on September 22, 1941.) [86]

(Immediately after the convening of court on Monday, September 22, 1941, the Court read the following written ruling:)

Since by the terms of the pre-trial stipulation the only evidence in the case about which there is serious controversy is defendant's evidence as to power site value, I deem my decision upon the government's objection thereto of sufficient importance to justify my presenting my ruling in writing.

The evidence to which the Government objects was outlined in defendant's counsel's statement of last Tuesday. That there may be no question about what the defendant hopes to prove, I will incorporate that statement in its entirety in this ruling.

To this offer, plaintiff interposes two objections:

1. That under the rule laid down in *U. S. vs. Chandler-Dumbar*, 229 U. S. 53, followed in *Continental Land Co., v. U. S.*, 88 Fed. (2d) 104, (certiorari denied October 11, 1937, 302 U. S. 715) a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States and is, therefore, barred from a recovery for any power site value of its riparian lands.

2. That, because paragraph 12 of the pre-trial stipulation includes an admission by defendant that the backwater from a dam constructed at Kettle Falls would flood approximately 518 tracts of privately owned land and approximately 400 different ownerships and would also flood some withdrawn or reserved public land of the United States (including Indian reservation land) and also some State land, therefore defendant is not entitled to recover power site value under the rule that no owner of any one or any number of tracts less than the whole [87] is entitled to be paid for a share of the value of the whole in condemnation proceedings unless there is a reasonable probability that all the ownerships could be combined.

This argument is made despite the fact that in Mr. Paine's opening statement he stated that defendant's testimony would show that reservoir lands could be readily acquired.

The questions involved in the discussion of the plaintiff's objection were thoroughly briefed. Many cases were presented to the Court. I want to assure counsel on both sides that each one of these cases was carefully examined and re-examined and carefully studied and re-studied. I have reached the conclusion, however, that my decision on this point should rest exclusively upon my opinion as to whether or not the Continental Land case is controlling in the case at bar. This is not because the Continental Land case involved the same river and the same government project as are involved here. The importance of the Continental Land case, so far as this case is concerned, lies in the fact that it was decided upon by the Court of Appeals for the Ninth Circuit and that the decision in effect had the approval of the Supreme Court. If the Circuit Court decided the precise questions which are now presented to me, then I am controlled by it. If, on the other hand, it can be distinguished from the case at bar, I feel this defendant should be entitled to complete its record in this trial if for no other reason than to prevent a duplication of the expense of preparation.

Defendant presents the following points of difference between the evidence in the Continental Land case and its proposed evidence in this case:

1. That the lands involved in the Continental case were [88] acquired by their owners for a small consideration with no purpose of using them as abutments in the construction of a dam. It is pointed out here that since the opening of the lands here involved for public settlement, these lands have been repeatedly sold and re-sold on the basis of their value for power site purposes. It is asserted that the testimony will show that the defendant paid \$150,000 for these lands in 1921.

2. In the Continental case, no development work was ever done by the owners looking towards the use of those lands for power site purposes; no application for rights was ever made to the Federal Power Commission; no one of the owners ever spent a cent in an effort to ascertain whether those lands were available for power site purposes. On the other hand, defendant's opening statement outlines an almost continuous activity from 1921 down to 1936 looking towards the ultimate use of the defendant's property for the construction of a dam. Applications were made to the Federal Power Commission, to the State Supervisor of Hydraulics of Washington, negotiations were conducted with the State Land Commissioner of Washington, and engineering and financial surveys were made as a result of all of which expenditures were made by the defendant corporation in a total amount including the cost of acquisition of \$471,653.25.

3. That the geological structure at Grand Coulee where the Continental lands were located was such

that to develop a full use of the project the immediate construction of a high dam was necessary which involved the expenditure of \$170,000,000. By comparison, it is asserted that the geological structure at Kettle Falls was such that an original dam in the amount of approximately \$9,000,000 could have been constructed on which there might later be imposed a higher dam at a cost of [89] \$11,000,000 and upon which there could be superimposed an additionally higher dam at an additional cost of \$11,000,000.

4. That in the Continental case the evidence revealed nothing to indicate either the ability or willingness of private capital to proceed with the construction and development of that enormous project. Defendant asserts that its evidence will prove that it was ready, able and willing to have proceeded with the construction at Kettle Falls had it not been prevented from so doing by the plaintiff.

5. Defendant's counsel states that it is presenting this case on a different theory than that pursued by counsel in the Continental case. There counsel relied upon the "inherent adaptability" theory asking for a verdict in an amount of three to four million dollars on the basis of the ratio of value which the lands used for the placing of the abutments to the dam would bear to the total structure. In this case counsel for defendant contend that they are not claiming any right to the use of the bed of the river or the water flowing over it but are simply asking the value of their lands upon the basis of

what private capital would pay for them in the event they should sell them to private industry seeking to use them in the construction of a private power dam. In that, counsel contend consideration would have to be given to the expenditures which defendant has made such as above described.

It must be apparent to anyone that these constitute real differences between the facts proved in the Continental case and the facts proposed to be proved in this case. The question for me to decide is whether or not the appellate court, in deciding the Continental case, was influenced by any of the facts in that case which were different from the facts in this case. [90] To decide that question, I must look at the opinion of the Court, the briefs of the parties and the transcript of the record on appeal. Each of these I have carefully examined. Let us now attempt to analyze what they contain.

APPELLANTS OPENING BRIEF

In their brief the appellants outlined the procedural situation in their statement of the case and outlined appellants' testimony in their statement of the facts. Next we find on Page 15 the following:

"The Question on Appeal

"The question on this appeal is, whether, on the facts contained in the record, the Court erred in striking Appellants' evidence, and in-

structing the jury not to consider the adaptability of the land for use as a damsite, in determining its market value.”

The assignments of error went to the trial court’s granting of the motion to strike from the record all testimony in regard to the market value of the land in question for damsite purposes, the claims of error as to instructions given and refused and in denying appellants’ motion for new trial and entering judgment for the Government.

The next item in the brief was entitled “Brief of the Argument.” Under this we find the statement that the special adaptability of the lands was conceded. This coincides with the provisions of Paragraph 7 of the pretrial stipulation here.

Next comes the statement of the rule that inherent adaptability of property for special use must be taken into consideration in determining the market value.

The next question raised is in reference to Judge [91] Webster’s ruling and the reasons stated therefor. Appellants contended that the mere fact that appellants did not own or have a license to the river bed does not exclude evidence of special adaptability. In support of that, the appellants there cited the same cases as are cited by defendant here starting with *Mississippi & Rum River Boom Company v. Patterson*, 98 U. S. 403 down to *Olson v. United States*, 292 U. S. 246. The appellants then contended that the fact that they did not own or have the

right to use the flow of the river did not exclude evidence of special adaptability. In support of that they relied upon the same cases as they had cited on the previous point except that they added thereto the case of *United States v. Chandler-Dunbar Company*, 229 U. S. 53.

The third point was that the fact that the Columbia River is navigable and that the Government was taking appellants' land in the aid of navigation did not exclude evidence of special adaptability. In support of that, they cited the same group of cases and added *Boston Chamber of Commerce v. Boston*, 217 U. S. 189.

The appellants then concluded their brief statement of their argument with the point that the improvement of navigation was not in the case and added then the citation of *Monogahela Navigation Company v. United States*, 148 U. S. 312.

Appellants then proceeded into a detailed argument of the points which I have just outlined. While the language that they used was different, I am convinced after careful study of it that, in its fundamental effect, the appellants presented there precisely the same argument as has been so ably presented by defendants' counsel here. While they cited other cases which have not been cited to me and while they failed to cite some [92] of the cases which counsel has cited to me, it is apparent that the cases upon which they mainly relied were precisely the same cases upon which defendants rely

here—Mississippi River Boom case and the Monongahela Navigation case, *Olson v. United States* and that portion of the *Chandler-Dunbar* opinion in which allowance for canal and lock purposes was approved by the Supreme Court. Of particular importance is the statement of summary and conclusion found on Page 66 of their brief as follows:

“Summary and Conclusion

1.

“We Believe That It Is Fair to State That the Following Facts Are Established Either By Admission or By Competent Evidence.

“1. That Appellants’ lands, which are taken in these proceedings, are uplands, situated above ordinary high water mark.

“2. That Appellants’ uplands possess inherent adaptability for use as a damsite.

“3. That they are the only lands in existence which are suitable and available for a damsite useful for the development of hydro-electric Power, and for irrigation, by using Grand Coulee as a storage reservoir.

“4. That these uses can be accomplished only by building a dam across the Columbia River at Grand Coulee and that no such dam can be built without using appellants’ lands.

“5. That, at the time of taking there was a market for appellants’ lands for use as a damsite by others than the Government, and that there was a ‘legal and practical possibility’

of their being acquired and used for that purpose.

“6. That, the market value of these lands was greatly increased because of their adaptability for a damsite, and that their market value can not be determined except by considering such adaptability.”

We next come to the

APPELLEE'S BRIEF

Here we find a detailed statement of the evidence which [93] includes the full statement of Judge Webster in deciding the case in this Court.

Next comes the appellee's brief statement of its position found on Pages 25-29 inclusive of appellee's brief. In that brief the Government made three contentions:

First, that Judge Webster's decision was correct on the proposition that the Government's paramount right, title and control of the beds and waters of navigable streams would defeat any claim of a riparian owner to the value of riparian upland lands for use as a damsite. In support of that decision, the Government relied upon the *Chandler-Dunbar* case, the case of *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288. On this point the authorities relied upon by the Government are the same as those relied upon by the Government here

except that they now have added the case of *U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377, which had not at that time been decided.

Appellee's second point was an attack upon the Continental Land Company's witnesses because they were not qualified as experts.

Appellee's third contention was that diversity of ownership and the large number of tracts which would necessarily be flooded defeated Continental Land Company's claim on the theory that where it was necessary to combine ownership of different properties in order to create a value, such value would not be permitted to be used as a basis for compensation of a claim in a condemnation action. In support of that point, the Government relied upon precisely the same cases as have been presented to me by Mr. Stoutemyer.

So far as I have been able to analyze appellants' reply [94] it was, in effect, merely a re-statement of the arguments presented in its opening brief.

The next question, then, is what did the Circuit Court of Appeals decide? Briefly stated, that Court sustained the position of the Government as to its first point. It ignored the Government's second point. As to the third point, the Circuit Court sustained the position of the Government **that the** lands had no inherent value for the purposes claimed because there was no evidence of reasonable probability of the combination of these lands with other necessary lands which would be required to complete the project for private use. However, on this

point the Circuit Court did not go as far as counsel for the Government contended there or contends here. It chose to follow the rule laid down in *McCandless v. United States*, 298 U. S. 342, in which it was held that the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect the market value. In writing the opinion for the Circuit Court, Judge Neterer outlined in extraordinary detail the facts of and the background for that case. He quoted at length from the decision of Judge Webster and concluded that quotation with the statement: "The Court could well rest affirmance upon the statement of Judge Webster in striking from the jury's consideration the evidence relating to damsite value." However, Judge Neterer saw fit to proceed with a further discussion of the Government's first point citing various cases and concluded with this language:

"No persuasive merit is impressed by argument that the court in this case was dealing with water power as a separate unit of property and inherent [95] adaptability of the land ('hypothetical additional value') as here contended for was not considered. All the expressions of the court in relation to each other, considered as a whole in disposition of the issue before it, are to the contrary.

"It is axiomatic that if the riparian owner has no right to approach the river as against

the right of navigation, he has no inherent right of value 'adaptable to special use' over and above the reasonable market value of the upland for any purpose to which it may reasonably be adapted now, or in a reasonable time in the future. This was fairly submitted to the jury. This issue is no newly created relation or right, but has existed long prior to the private ownership in the land. The rights were fixed and relations established by the adoption of the Constitution."

The remainder of Judge Neterer's opinion is directed to the third point presented by the Government upon the question of diversity of ownership. It was in the consideration of this point that Judge Neterer, for the first and only time, discussed the facts of that case insofar as those facts differed from the facts of this case. Counsel for defendants contends that because those differing facts were discussed in that portion of Judge Neterer's opinion that it must be concluded that those facts influenced that Court in its decision on the Government's first point. I can not agree with that contention. Nowhere in Judge Webster's decision nor in that portion of the opinion of the Circuit Court dealing with the Government's point [96] number one is there any indication that any of the facts which I have outlined in points 1-4 inclusive in my classification of the differences between the facts here and the facts in the Continental case were ever even con-

sidered. The mere fact that Judge Neterer mentioned them in discussing the Government's third point has no relationship to the consideration of the first one.

However, as I previously stated, defendant's counsel is presenting this case on a different theory from that pursued by counsel in the Continental case. He states that he is not using the "inherent adaptability" theory and that when Judge Webster and Judge Neterer used the language "hypothetical value" they had in mind an entirely different situation than that which he presents here. He states that he is making no claim to the right to use the bed of the river nor to the use of the water. He therefore, contends that he presents an entirely different case than that upon which Judge Webster and the Circuit Court of Appeals passed. Let us examine that argument.

Any money which defendant has spent in purchasing, investigating or improving this property was spent for the purpose of its use in providing abutments for a hydroelectric power dam. If it had not been suitable for that purpose, defendant would not have paid \$150,000 for it nor would it have spent another cent upon it. Aside from its use as agricultural land, defendant's land is valueless except for power site purposes. Unless it is used for power site purposes, it is also valueless regardless of how much money has been spent upon it. None of these prospective purchasers would have been interested in it had they known that

they could not build a dam across the river at that point. The use of the bed of the river and the flow of [97] the stream is insuperably connected with the use of the adjoining uplands in creating a value for power site purposes. Defendant could have spent \$5,000,000 or \$500,000,000 in the development of this property without making any difference. It only became valuable when it could earn on an investment through the creation of profits resulting from the sale of electrical energy. That value does not exist in a riparian owner as against the United States. I appreciate that counsel for defendant, with the utmost earnestness and all sincerity believes that he has offered to present a different case than that presented by the attorneys in the Continental case. He thinks that by disassociating the claim for the uplands from the claim for the use of the bed of the river or the flow of the stream that he can make out a case for a separate value. There is no such value. The uplands can not be disassociated from the bed of the river and the flow of the stream. Without the use of the bed of the river or the flow of the stream these uplands are no more capable of use for power site purposes than any other land in the arid region of Central Washington. But counsel says that they have actually expended almost half a million dollars in the purchase and development of this property as a power site. They might have gone further and have installed all of their generating equipment and their transmission lines but they still would not have had anything of value

as a power site. It takes the flow of running water to create value on hydroelectric development. The Government controls that. The Government has always controlled it and it is immaterial how much money defendant may have spent it would not get a power site of any value. Let me illustrate by what is probably an absurd example. Sometimes it requires absurd [98] examples to bring out the fallacies of very appealing arguments. I might spend an unlimited sum building and equipping a sanitarium for nervous patients on the land between the Milwaukee and Great Northern tracks in the center of Spokane. I might invest there a million dollars. I might have every piece of equipment known to modern medical science. It would not have the slightest value as a sanitarium for nervous patients. Should a condemnation action be brought against the property, I could recover nothing on the basis of its value as a sanitarium. Unfortunately, the defendant here invested its money and expended its funds in an effort to create a value which could not exist separate and apart from the use of other property which the Government controlled and which the Government decided not to permit this defendant to use. The defendant very naturally feels aggrieved that it is compelled to suffer this loss. It, however, must be realized that it purchased this property and expended these funds after the passage by the Congress of the Federal Power Act and eight years after the Supreme Court had decided the case of *United States v. Chandler-Dunbar*. De-

spite that fact, however, I would be strongly inclined to consider that portion of counsel's argument were it not for the opinion of the Supreme Court in the Appalachian Power case. There the Court said:

“The Federal Government has domination over the water power inherent in flowing streams. It is liable to no one for its use or non-use. The exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion. . . . Water Power development from dams in navigable streams is from the public's standpoint a by-produce of the general use of the rivers for commerce.”

I am forced to the conclusion that there is no real dis- [99] tinction between the facts of this case and the facts of the Continental case. Therefore, despite my determination to permit the introduction of this testimony if a way could be found to justify it, I am now convinced that it would be of service to no one to take the time or to expend the money necessary to permit the introduction of defendant's proposed testimony. It may well be that the Circuit Court will decide that on the basis of the different facts of this case it will make a different ruling from that in the Continental case. Until then, I am bound by that decision.

Mr. Herman: If the Court please, you will allow us an exception to your ruling?

The Court: I will allow an exception. Do you want to make offers of proof, Mr. Paine?

Mr. Paine: Yes, if Your Honor please. This will take some little time. I don't know whether they should be made in the presence or the absence of the jury.

The Court: I don't know that it makes any difference. Do you want a little time to get ready?

Mr. Keith: May I say, Your Honor, that I think they should be made in the absence of the jury.

Mr. Paine: All right, about a five-minute recess, (Whereupon, a short recess was taken)

The Court: Before you start, for fear I may forget it, you will remember that during the plaintiff's case there was an offer made of the exhibit which constituted the denial of the application by the Federal Power Commission, and I reserved decision on that. I very largely agree with the position which the defendant takes on that, that the granting or failure to grant an application under all of the facts developed is not material and I will sustain the objection of the defendant to the introduction of Plaintiff's Exhibit "A" and will allow an [100] exception to the Government.

Mr. Paine: On these offers of proof, in order that we may run into no technical questions, the witnesses are all present in court and I think for the purpose of the record I would like to call them and maybe have them sworn as a group so that the record can show that the witnesses are present and sworn, ready to testify, so that there will be no question

about failure to make the proper offer and failure to have the necessary witnesses, so that if these gentlemen will stand I will ask to have them sworn: Mr. E. H. Collins, Mr. J. P. Graves, Mr. A. T. Larned, Mr. M. O. Leighton, Mr. W. F. Miller, Mr. K. M. Robinson and Mr. O. B. Shay. (The foregoing witnesses rose, were sworn by the clerk to the effect that the testimony they were about to give was the truth and nothing but the truth.)

Offer of Proof No. 1

Mr. Paine: Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the Kettle Falls site has been recognized in surveys and studies as one of the most suitable and feasible sites on the river for the development of electrical energy.

I am going to break these into quite numerous offers, Your Honor, because under the rulings an offer may be rejected if any part is improper or inadmissible, and some may be improper or inadmissible on some other ground than the general ground on which Your Honor held.

The Court: Then it will be necessary for the Government to make its objections. Let the record show that the Government [101] objects to all of the offers on the grounds which were heretofore

stated and upon which a ruling was made this morning.

Mr. Keith: I hope that it would speed proceedings if we can have a general objection, but I am reluctant to take a general objection unless we have the consent of the defendants that they may be considered as a specific objection to each offer of proof.

Mr. Herman: It won't take long for him to specifically object and for Your Honor to rule and for us to take our exceptions.

Mr. Keith: I object to the offer of proof upon the grounds stated in the argument.

The Court: Objection sustained.

Mr. Paine: Exception.

The Court: Exception allowed.

Offer of Proof No. 2

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that many projects have been construed under the provisions of the Federal Power Act, and the reasonable prices for said sites have been included as legitimate expense on the part of the companies constructing said power projects.

Mr. Keith: I object to the offer on the grounds stated and upon the additional ground that the evidence offered is immaterial.

The Court: Sustain the objection on the first ground and I will overrule the objection on the second ground. I think that while the general rule is that they can't prove expenditures, I think the nature of this case is such that had I [102] permitted the testimony of the defendant to be admitted that I would have to permit them to prove the amount of the expenditures because they cover the question of its value as a power site and the ultimate question for the witness, like Mr. Graves if he testified, would be as to its market value: For example, the money that you spent in boring, you would probably show the amount that you spent in boring, because any purchaser would take that fact into consideration in determining how much they would pay for it. Therefore, I will overrule the objection on that ground and allow an exception for the first ruling to the defendant.

Offer of Proof No. 3

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that by the Act of August 30, 1935, the United States authorized and adopted the Grand Coulee Dam project providing for the erection of a dam of sufficient height to flood the lands of the defendant at Kettle

Falls and completely eliminate the head of water at Kettle Falls; that the defendant's land has been taken by the United States in this proceeding as a part of said Grand Coulee Dam project; that had this development, as a part of which the defendant's lands are being condemned, not been made, the defendant at this time would have been ready to construct a hydroelectric project at Kettle Falls.

Mr. Keith: We object on the general ground and also on the special ground that the testimony offered would be immaterial.

The Court: I will sustain the objection on the general ground and allow an exception and overrule the objection on the [103] special ground.

Offer of Proof No. 4

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness that the shore lands of the State of Washington adjoining the property of the defendant, The Washington Water Power Company, being herein condemned were negotiated for by The Washington Water Power Company with the State of Washington; that the State of Washington, acting by and through the Land Commissioner of said state, had agreed to sell said shorelands on each side of the Columbia

River to the defendant, The Washington Water Power Company, for approximately \$29,000, and that said agreement was in full force and effect and in good standing on August 30, 1935, when the United States Government authorized and adopted the Grand Coulee Dam project.

Mr. Keith: I object to that on the general grounds.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 5

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company had made application to the State Supervisor of Hydraulics by applications No. 708 and 709 for permits to appropriate and store waters of the Columbia River; that its applications were prior in point of time to any other applications made with reference to the use of the waters of said river; that The Washington Water Power Company did keep said applications in good standing and did pay all license fees [104] due the State of Washington; that on July 17, 1934, the State Supervisor of Hydraulics advised The Washington Water Power Co. that its applications to appropriate and store the waters at

Kettle Falls would be kept in good standing until such time as the United States Government took steps to construct the high dam at Grand Coulee; that the aforesaid applications were finally canceled by the State Supervisor of Hydraulics after the United States Government started construction of said dam at Grand Coulee; and that said cancellation of said applications was the consequence of such construction by the United States of America.

Mr. Keith: I object on the general grounds and also the special ground that the proof, if offered, would be immaterial.

The Court: Sustain the objection on the general ground and allow an exception and overrule the objection on the special ground.

Offer of Proof No. 6

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that as a result of and by reason of the action of the United States Government in authorizing and adopting the Grand Coulee dam project under the Act of August 30, 1935, and by reason of the action of the United States Government in proceeding with the construction of the Grand Coulee high dam, the Supervisor of Hydraulics of the State of Washington canceled the said applications, Nos. 708 and 709.

Mr. Keith: We object to that upon the general grounds and also on the special ground that it is immaterial, and further- [105] more, that the witness through whom the offer is made is incompetent to testify.

The Court: I will sustain the objection on the general ground and overrule it on the special ground. I want the Circuit Court of Appeals to get the statement clear on that.

Mr. Herman: If the Court please, allow us an exception.

The Court: And will allow an exception.

Offer of Proof No. 7

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the land of the defendant, The Washington Water Power Company, which has been taken by the United States and for which the jury is to make an award in this cause consisted of 330.31 acres of upland adjacent to the Columbia River. That is probably covered by the stipulation as an admitted fact. We want to get it in definitely in the proof that it was uplands and not submerged lands or not bottom lands as talked about in some of these other cases as being below the high water mark.

Mr. Keith: We have no objection to this offer of proof but think it is covered completely by the stipulation.

The Court: I think so and I don't believe it is desirable to inject the question as to possibly being under controversy. I certainly decided the objection on the theory that it was uplands.

Mr. Keith: In order to keep the record clear on that point, that there is no doubt in the minds of counsel for the defendant that the land taken by the United States in this proceeding is upland as a fact, I am willing to stipulate that the [106] 330.31 acres of land taken by the United States are upland lands.

Mr. Paine: With that, we will withdraw offer No. 7.

The Court: All right.

Mr. Herman: The record will show that we have so stipulated, then, Your Honor?

The Court: Yes.

Offer of Proof No. 8

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that during the period from 1921 to 1936, the defendant, The Washington Water Power Company, entered into and conducted negotiations with the Federal

Power Commission to obtain a license to develop the power site on its lands which are the subject of this litigation and said negotiations continued until the Federal Power Commission denied the defendant a license to develop said site after Congress passed the Act of August 30, 1935, authorizing and approving the Grand Coulee dam.

Mr. Keith: I object to that on the general grounds and on the special ground that it is immaterial and that the witness is incompetent to testify to the facts offered.

The Court: Sustain the objection on the general grounds and allow an exception and overrule the objection on the special ground.

Offer of Proof No. 9

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, [107] that during the time the defendant, The Washington Water Power Company, was making studies relative to the development of hydro-electric power at the Kettle Falls project after it was the owner of the lands here involved, and before the Act of August 30, 1935, authorizing and approving the Grand Coulee dam project, it obtained original records of stream flow data and river data relative to the Columbia River extending from the Canadian bor-

der to what is known as Rickey Rapids below Kettle Falls; this river data was made use of by the Bureau of Reclamation in making plans for the development of the Grand Coulee project and in connection with their hearings before the International Joint Commission relative to the encroachment of backwater into the Dominion of Canada during the period just prior to the submersion of the Kettle Falls property by the United States; that during the time it was making such studies of the Columbia River, the defendant, The Washington Water Power Company, built a gauging station on the Columbia River in connection with its engineering studies and that said gauging station was operated during said time by the United States Geological Survey at the request of the Bureau of Reclamation.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 10

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that topographical maps were made by The Washington Water Power Company of the territory along the Columbia River from the Canadian border to what is known as

Rickey Rapids below Kettle [108] Falls during the time it was making the aforesaid studies, which maps were furnished to the Bureau of Reclamation at its request and used by said Bureau of Reclamation in connection with its plans for the construction of Grand Coulee.

Mr. Keith: We object on the general objection and the special objection that it is immaterial.

The Court: Sustain the general objection and allow an exception and overrule the special objection.

Offer of Proof No. 11

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the United States army engineers undertook to make a study of the Columbia River and its tributaries and a report was made, commonly known as the No. 308 report and published as House Document No. 103. In this report the army engineers made use of all data obtained from the defendant in making studies of power development at Kettle Falls. All of this data was collected by The Washington Water Power Company during the time it owned said lands and during the times it was making said studies, under the direction of the District Engineer of the United States army engineers at

Seattle, Washington, and a considerable part of said data was assembled at the specific request of said District Engineer of the United States army engineers.

Mr. Keith: Objected to on the general grounds and upon the special ground that it is immaterial and that the witness through whom the offer is made is incompetent to testify.

The Court: Sustain the objection on the general ground [109] and allow an exception and overrule the objection on the special ground.

Offer of Proof No. 12

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the sum of \$156,043.35 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time they were purchased by the defendant, The Washington Water Power Company, in 1921.

Mr. Keith: The offer is objected to on the general grounds and furthermore, on the special ground that the testimony offered is immaterial and that the purchase price of the lands is not proper testimony as to the reasonable market value.

The Court: Sustain the objection on the general grounds and allow an exception and overrule the special objection.

Offer of Proof No. 13

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that he is the Hydraulic Engineer of the defendant, The Washington Water Power Company; that he has been continuously employed by the defendant, The Washington Water Power Company, since May 1921, the year in which the said defendant, The Washington Water Power Company acquired the Kettle Falls site, that is, the lands herein involved; that he has had conferred upon him the degree of Bachelor of Science by the Michigan Agricultural [110] College, now known as the Michigan State College; that the Michigan State College conferred upon him the degree of Civil Engineer in August, 1926; that as part of his duties in connection with his employment with The Washington Water Power Company he was assigned to the engineering department and was connected with all of the transactions involving the development of the lands herein involved.

Mr. Keith: No objection to the offer of proof as to the witness' qualifications. I am willing to stipulate for the purpose of the record that Mr. Collins

is possessed with the qualifications of an engineer and is qualified to testify as an engineer.

Mr. Paine: But this contains further material which has been connected——

The Court: I would permit him to testify as to his qualifications if he had been put on in the first place. I wouldn't sustain an objection to that testimony just because I sustained an objection to what he subsequently testified to. He is entitled to have the witness testify as to his qualifications.

Mr. Paine: Then the stipulation is that the Government has stipulated that the Witness Collins has the qualifications mentioned in the offer of proof?

Mr. Keith: Yes.

Offer of Proof No. 14

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the Witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that in the opinion of the said witness the highest use to which the land involved in this proceeding could be devoted would be [111] as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abut-

ment lands, taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric plant using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such land as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000.

Mr. Keith: I object to the offer on the general grounds and upon the special ground that the witness would not be competent to testify as to the fair market value.

The Court: Sustain the general objection and allow an exception, and overrule the special objection. [112]

Offer of Proof No. 15

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that shortly after acquiring the property The Washington Water Power Company made application to the Federal Power Commission for a preliminary permit on the 30th day of June, 1921; that a preliminary permit was issued designating said project as Project No. 229 on July 26, 1922; that after the granting of said preliminary permit The Washington Water Power Company proceeded to carry on the survey work necessary to obtain the data and information relative to the development of said site; that topographical surveys of the power site land and water surfaces contained within the limit of the project were prepared; that stream measurements were made of the Columbia River at the Town of Marcus; that foundation explorations were carried on, consisting of diamond drilling and wash borings of the proposed site; that said permit was maintained in good standing at all times; that application for a permit under the terms of the Federal Power Commission Act was prepared and the application was made to the Federal Power Commission on July 26, 1922; that on July 16, 1925, The Washington Water Power Company filed application for a Federal Power Commission license.

Mr. Keith: We object to the testimony offered

on the general grounds and upon the special ground that the testimony offered is immaterial.

The Court: Sustain the objection on the general grounds and allow an exception; overrule the objection on the special ground. [113]

Offer of Proof No. 16

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that shortly after the application for the development of the Kettle Falls project was made, an application was made by the Washington Water Power Company in 1926 to develop the Chelan project. The Chelan project was a federal licensed project. That considerable correspondence developed between The Washington Water Power Company and the Federal Power Commission; that the Federal Power Commission approved and consented to the development of the Chelan site ahead of the Kettle Falls site; that the application for the Kettle Falls site was kept in good standing during this period.

Mr. Keith: We object to the testimony offered on the general grounds and upon the special ground that it is immaterial.

The Court: I will sustain the objection on the general ground and allow an exception; overrule

the objection on the special ground, and will say that my reason for overruling the objection on the special ground all the way through is that the objection that the testimony is immaterial is not sufficiently definite for me to indicate what objection you may have to it and I don't want any inference to be drawn from the record that when I overrule the objection as immaterial that I mean that it is material. It seems to me that your special objection, not definitely stated, might leave that inference. I have already ruled that it is immaterial.

Mr. Keith: That may be true. In connection with the last [114] offer, my objection as to the question of immateriality is upon the question that the offer of proof relative to the construction of the Chelan project ahead of the Kettle Falls project would not have any logical tendency to prove or disprove any offer in this case.

The Court: The only materiality it may have, assuming that I should have ruled the other way, would be upon the basis that it would be an explanation of why The Washington Water Power Company had waited so long on the Kettle Falls project, and on that basis I think it should be admitted. I will overrule the objection.

Offer of Proof No. 17

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the wit-

ness E. H. Collins, who is present in the court room and who has been sworn as a witness, that in 1928 Major Butler, District Engineer of the United States army engineers, requested The Washington Water Power Company to make detailed designs and to submit additional foundation data and other information relative to its application for license.

Mr. Keith: Objected to upon the general ground.

The Court: The objection is sustained and exception allowed.

Offer of Proof No. 18

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the request of Major Butler, District Engineer of the [115] United States army engineers, for detailed designs and additional foundation data and other information was complied with and the information submitted.

Mr. Keith: Objected to on the general grounds.

The Court: Objection sustained on the general grounds and exception allowed.

Offer of Proof No. 19

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness

E. H. Collins, who is present in the court room and who has been sworn as a witness, that in 1931 Major Butler, District Engineer of the United States army engineers, requested all of the data available of The Washington Water Power Company's studies of the 120-foot head project, and that such request was complied with on January 15, 1931.

Mr. Keith: Objected to on the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 20

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company had completed and prepared all the necessary data, with survey maps, preliminary engineering studies for the purpose of showing that it was prepared on December 9, 1939, to start with the construction of the project.

Mr. Keith: Objected to on the general grounds, and upon the special ground that it is not material to the controversy [116] here whether they were going to build on December, 1939, or at a later date.

The Court: The general objection is sustained and exception allowed and special objection overruled.

Offer of Proof No. 21

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that he is familiar with the monies actually spent by The Washington Water Power Company in the development work and that they were spent under his supervision; that The Washington Water Power Company spent the sum of \$22,553.65 determining the stream flow of the Columbia River by means of various cables and supports across the Columbia River and construction of various gauges, including the automatic gauging station; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands, and that without the lands to which the said data applies, namely, the land involved herein, said data procured at the said cost of \$22,553.65 becomes valueless and useless to the defendant or to anyone except the United States Government.

Mr. Keith: Objected to upon the general ground and upon the special ground that the testimony as to expenditures made by the land owner would be immaterial as not having a bearing upon the fair market value for the lands in question.

The Court: Sustain the objection on the general ground and allow an exception, and overrule the objection on the [117] special ground for the reason that it appears to me that testimony of that kind, though ordinarily not admissible, would be admissible in this case in explanation of the fact that during the period of 1921 to 1936, the Company thought the land was valuable for power site purposes and it does enter into the consideration of the fair market value of the land if the Company wanted to sell.

Offer of Proof No. 22

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company spent the sum of \$20,597.52 installing gauges to establish water surface profiles on the Columbia River and also cross-sections of the river at these various gauges extending from the Canadian border to Rickey Rapids, a short distance below Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said land; that said sum of \$20,597.52 was necessary for compiling of said data, and that without the lands to which the

said data applies, namely, the lands involved herein, said data becomes valueless and useless to The Washington Water Power Company and to anyone but the United States Government.

Mr. Keith: Objected to upon the general grounds and upon the special ground that expenditures made by the landowner have no tendency to prove the issues in this case as to the fair market value of the land.

The Court: Sustain the objection on the general grounds [118] and allow an exception, and overrule the objection on the special ground.

Offer of Proof No. 23

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the courtroom and who has been sworn as a witness, that The Washington Water Power Company spent the sum of \$52,268.96 in the preparation of topographical maps of the banks of the Columbia River extending from the Canadian border to Rickey Rapids, a short distance below Kettle Falls; that these maps were necessary as part of the preliminary development of the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric

project and would be of value to a purchaser who purchased said lands; that said sum of \$52,268.96 was necessary for the compiling of said data and that without the land to which the said data applies, namely, the lands involved herein, said data becomes worthless and useless to defendant, The Washington Water Power Company, or anyone except the United States.

Mr. Keith: Objected to upon the general ground and upon the special ground that the offered testimony as to expenditures made upon the land in connection with any prospective use of the land would have no tendency to prove the issue of the fair market value.

The Court: Sustain the objection on the general ground and exception allowed; overrule the objection on the special ground. [119]

Offer of Proof No. 24

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company spent the sum of \$98,970.08 to make wash borings and diamond drillings for the purpose of exploring foundations and conditions of the project; that these diamond drillings and wash borings established that

there was a sound rock foundation for the building of said dam; that said diamond drilling and wash borings were a necessary part of the construction of any project on the lands here involved and that without the said lands to which diamond drilling and wash boring applied, said data becomes valueless and useless to the defendant, or anyone except the United States.

Mr. Keith: Objected to upon the general ground and upon the special ground that the testimony offered to prove the expenditures in connection with the prospective use of this land has no tendency to prove the fair market value.

The Court: Sustain the objection on the general ground and exception allowed, and overrule the objection on the special ground.

Offer of Proof No. 25

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that diamond drilling and wash borings made by the defendant, The Washington Water Power Company, enhanced the value of said land; that they are valuable to a purchaser who desires to use these lands for the purpose of hydro-electric development. [120]

Mr. Keith: Objection on the general ground and the special ground that the testimony as to expenditures of this kind has no tendency to prove the fair market value.

The Court: Sustain the objection on the general ground and exception allowed, and overrule the objection on the special ground.

Offer of Proof No. 26

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company spent the sum of \$106,333.23 for general engineering studies, including various investigations and preparation of necessary data, including the design of the power house and details of all of the necessary pertinent works; that the general engineering studies made by the defendant, The Washington Water Power Company, were necessary as a preliminary expense in the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that without the land to which the said data applied, namely, the land involved

herein, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone else except the United States.

Mr. Keith: Objected to upon the general grounds and upon the special ground that the expenditures for engineering studies would have no value in proving the fair market value.

The Court: Sustain the objection on the general ground [121] and allow an exception, and overrule the objection on the special ground.

Offer of Proof No. 27

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness E. H. Collins, who is present in the court room and who has been sworn as a witness, that the total cost of The Washington Water Power Company's investment in this project for necessary preliminary engineering and survey work, including the cost of lands, is \$465,785.97, and that said sum is fair and reasonable.

(I made a slight recapitulation of figures a little bit different than I gave in my opening statement and Your Honor used in your memorandum. It is \$465,785.97.)

That all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric pro-

ject and would be of value to a purchaser who purchased said lands; that without the lands here involved to which said data applies, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone except the United States.

Mr. Keith: We object upon the general ground and upon the special ground that the evidence as to the total amount of expenditures on the land has no tendency to prove or establish the fair market value.

The Court: Sustain the objection and allow an exception and overrule the special objection.

Offer of Proof No. 28

Mr. Paine:

Comes now the defendant, The Washington Water Power Com- [122] pany, and offers to prove the following matters, allegations and things set forth and contained upon Pages 720 to 726, inclusive, of that report entitled "The Columbia River and Minor Tributaries, House Document No. 103." Said House Document No. 103 is hereby offered in evidence in connection with this offer of proof, and as one of the documents covered by the stipulation re: evidence now on file herein.

Now, the stipulation, as Your Honor recalls, permits the introduction in evidence of any official Government report without any proof as to its authenticity of publication and so forth. We don't want to put in, of course, the whole of the publica-

tion "The Columbia River and Minor Tributaries" but only these pages. I don't believe it will be necessary for me to read them to the reporter at this time. The book can be available and they can be copied in in entirety in the record merely by a reference to the pages, but I think I would rather have them copied, these pages 720 to 726, inclusive, into that offer from the document. Now, if Your Honor wants to read it to make a ruling on it, or if you want to glance through it, it is the report of the United States engineers that they made on the Columbia River and its minor tributaries in regard to the Kettle Falls project, giving a detailed description of its geological formation, the topography and geology, its power possibilities, including the cost, estimated capital cost for the development of the Kettle Falls site, both for private development and public development, including the cost of the preliminary expenses and the acquisition of the dam site lands, the cost for the acquisition of the reservoir land, the feasibility of the development by private capital, and reciting the fact that The Washington Water Power Company had made and there [123] was pending its application for a license before the Federal Power Commission.

The Court: Well, as far as I am concerned, it is fairly satisfactory to just have the reporter copy that part.

Mr. Herman: It can easily be read to Your Honor.

Mr. Paine: I don't want to trespass upon your time for a mere technicality but I don't want any question raised that Your Honor wasn't fully apprised of the nature of the material contained in the offer.

The Court: The record may show that I have already read it and there is no necessity for reading it to me again.

Mr. Herman: And it may be admitted to have been read in connection with the offer.

Mr. Keith: I make no objection on the ground it wasn't read in its entirety but do object to it upon the general grounds.

The Court: Objection sustained and exception allowed.

(The part of the offer described as Pages 720 to 726, inclusive, of the report "Columbia River and Minor Tributaries" is as follows:)

(2) Undeveloped Power—1. Sites on Main Stream

(a) Kettle Falls—1. Detailed Description

500. This site is located in section 11, township 36, north, range 37 east Willamette meridian, at the Kettle Falls of Columbia River. It is about three miles north of the town of Kettle Falls and about seventy miles north of the city of Spokane. The site is forty-one miles by river from the international boundary, 110 miles above the Grand Coulee site, 383 miles above the mouth of Snake River. The general location [124] is shown on plate No. 1, page 365.

a. Resume.

Drainage area	square miles	64,500
Length of pool.....	miles	41
Length of dam.....	feet	2,550
Height of dam (maximum section, foundation to walkway).....	do	163
Drawdown (elevation 1,288.4 to 1,278.4 feet)	do	10
Useful pondage	acre-feet	91,000
Natural low-water elevation.....	feet	1,165
Maximum known discharge (June 1894)	second-feet	700,000
Spillway capacity	do	875,000
Natural river flow (April 1913 to March 1931, Inc.):		
Maximum discharge, 24 hours.....	do	468,000
Mean discharge	do	100,000
Minimum discharge, 24 hours.....	do	14,000
Average static head.....	feet	114
Power capacity (Federal Power Commission definition) horsepower.....		217,000
Proposed hydraulic capacity.....	second-feet	71,000
Proposed installed capacity.....	kilowatts	447,700

501. b. Topography and geology.—The Columbia at this site flows south and is separated into two channels by a low, rocky reef three quarters mile long, known as “Hayes Island.” See plate no. 37² for topography of the site. The channel on the right, designated the “Main” is the larger of the two; the other channel is designated the “Minor.” Both channels are somewhat obstructed by rocky islets. The water makes the major portion of its descent in two

²Not printed.

falls—the upper situated about midway of the length of Hayes Island and the lower at a narrow [125] constriction just below the confluence of the two channels. The natural low-water elevation above the dam site at the upper end of Hayes Island is 1,202 feet, and at the foot of the lower falls is 1,165 feet.

502. The rock formation at the site is a heavy bed of hard quartzite and quartz-mica schist, which outcrops rather uniformly along the shores and in the stream bed. The overburden is a glacial drift and is apparently shallow at the dam site. A considerable number of exploratory holes have been drilled by the Washington Water Power Co. at the site, and the resulting data have been filed with the Federal Power Commission. These explorations indicate that the foundation rock, at all places drilled, is suitable for structures of the magnitude outlined hereafter in this report.

503. During the study of the Columbia River a power site at the Little Dalles was investigated. It is located 15 miles by river from the international boundary, and 26 miles above the Kettle Falls site. A topographic survey of the site was made, and a map of the site is shown on plate no. 38.² The natural low water elevation is 1,243.4 feet. No test borings or other subsurface investigations were made. The chan-

²Not printed.

nel at the site is less than 200 feet wide at low water and is at least 55 feet deep. Outcropping limestone on both banks extends from the water's edge up to an elevation of about 1,300 feet. The forebay could not be maintained above elevation 1,288.4 feet without backing the water up into Canada and causing international complications; hence the head would be limited to 45 feet at the lowest flow and would be only 24 feet for a flow of 200,000 second-feet. Due to the [126] restricted channel, the head reduces to such an extent for the higher flows that the plant could not operate more than 10 months in a year of average flow. Under these conditions it was considered more economical to develop this head at either the Kettle Falls site or at the Grand Coulee site, either of which would be advantageous from the standpoint of increased pondage. Further consideration was not given, therefore, to the Little Dalles site.

504. c. Power possibilities.—The proposed elevation of the forebay is 1,288.4 feet, which would back the water up to the international boundary 41 miles upstream. The natural water surface for a flow of 18,700 second-feet is 1,291.5 feet at the boundary. A 10-foot drawdown, with a resulting pondage of 91,000 acre-feet, can be utilized to provide for daily variation of load. The maximum head at the site would be 124 feet, and the mean static head for natural flow

would be 114 feet. The head available for the assumed maximum discharge would be 75 feet, hence the turbines would not be "drowned out" during any anticipated floods. The mean monthly natural discharge for the 18-year period, April 1913 to March 1931, inclusive, is shown in table no. 22.

505. Plate no. 39² contains 27 power graphs showing the available power for the high, mean, and low years of the 17-year period ended March 31, 1930, for three installed capacities for natural flow (case 1 of plate no. 41)² and for flows regulated by means of upstream storage for cases 2 and 6 of plate no. 41.² Note especially that graphs 10 to 27, inclusive, take into account the effect of regulation of upstream storage, but no regulation of storage at the site. [127]

506. The three hydraulic capacities considered on plate no. 39 are equal to the natural flow for 35 percent, 50 percent, and 90 percent of the time. These three flows were arbitrarily selected as a basis for a study of the power possibilities of the site, and are not to be confused with the hydraulic capacity as set up in the resume and hereafter in this report.

507. The three plant capacities expressed in kilowatts are those capacities which correspond to the above selected flows and to the heads ob-

²Not printed.

taining at these flows. It so happens that the intermediate capacity of 463,000 kilowatts approximates the capacity set-up in the resume. The tables accompanying the graphs also show the utilization and plant capacity factors for 100 percent operation. These factors are shown graphically on plate no. 40.² By comparison of graphs 2, 11 and 20, on plate no. 39,² it is noted that regulation increases the annual utilization factor from 55 percent to 63 and 64 percent, respectively, for the pumping and gravity plans for the low year, with a hydraulic capacity of 58,200 second-feet, which discharge was equaled or exceeded 50 percent of the time during the 17-year period. See case 1 of plate no. 41.² Likewise, the total power available for the low year with the above plant capacity is 298,000, 345,000, and 323,000 kilowatt-years for natural flow and for regulated flows for the pumping and gravity plans, respectively.

508. The table on plate no. 41² shows the power duration 35, 50, 65, 80, 90, and 100 percent of the time for the 17-year period ended March 1930 for natural flow, and for the regulated pumping and gravity plans. In obtaining the regulated [128] flows shown in that table control of the following reservoirs was assumed after allowing for withdrawal of irrigation water, as stated in paragraph 178.

²Not printed.

Reservoir:	Approximate Capacity in Acres-feet
Hungry Horse	1 100,000
Flathead Lake	1,540,000
Priest Lake	569,000
Pend Oreille Lake	1,610,000
Kootanay Lake	715,000
Total	5,534,000

509. In case 2 of plate no. 41,² the Columbia Basin irrigation project would be irrigated with water from Clark Fork and Spokane River. In case 6 it would be irrigated with water pumped from the Columbia River at Grand Conlee.

510. As a basis of comparison, the potential power available 90 percent of the time is 199,000; 256,000 and 291,000 kilowatts for cases 1, 2 and 6, respectively; or, considering case 1 as 100 percent, case 2 would be 129 percent, and case 6 would be 146 percent. For similar conditions of regulation, the increase in potential power under the pumping plan, for 90 and 100 percent of the time, over that obtaining under the gravity plan, is worthy of note.

511. The duration of potential power for cases 1, 2, and 6 is shown graphically on plate no. 41.² The energy available annually for various cases as indicated on this plate is shown on table no. 105. [129]

²Not printed.

Table No. 105.—Energy available at the Kettle Falls site for 17-year period ended March 31, 1930.

Case	90 percent of the time	Additional energy for 50 percent of the time	Further additional energy for 35 percent of the time
	Kilowatt-years	Kilowatt-years	Kilowatt-years
1	196,000	176,000	121,000
2	254,000	148,000	94,000
6	289,000	140,000	100,000

512. The installed capacity selected for discussion is 447,700 kilowatts, which is based on the available potential power in case no. 6 for 90 percent of the time (291,000 kilowatts) with a 65 percent load factor. The power house, as shown on plate no. 37,² and the estimates of cost given hereafter were based on this installed capacity.

513. d. Proposed development.—The project works, as planned, involves the construction of a dam extending across the Main Channel, thence downstream on Hayes Island, paralleling this channel to the power house, and a power house situated on the lower end of Hayes Island and extending across the Minor Channel above the lower falls. See plate no. 37 for general arrangement and location. In order to utilize this head it was planned to excavate a

²Not printed.

channel for the tail-race through the peninsula adjacent to the lower falls.

514. The dam would be a gravity-type concrete structure. The section extending across the Main Channel would provide a spillway with crest at elevation 1,253.4 feet, surmounted by 13 Stoney gates 50 feet long by 35 feet high. At the left end, an abutment section would curve downstream on Hayes Island, to connect to another spillway section containing 8 Stoney [130] gates of the same dimensions as those in the Main Channel. A free overflow crest with an elevation of 1,288.4 feet and length of 840 feet would be constructed between this spillway section and the power house. Thus, a total spillway capacity of 875,000 second-feet at normal forebay level would be provided.

515. The power house, as planned, would be constructed of sufficient size to accommodate 12 main units and 2 house units. Each main unit would consist of a vertical shaft, Francis-type turbine direct-connected to a 37,310-kilowatt generator. The turbine would have a hydraulic capacity of 5,917 second-feet at a head of 92.6 feet, which is the head available at the site for the month of maximum flow for the 17-year period. Transformers in the back portion of the building would step the voltage up to 220,000 volts, for delivery to an outdoor switching station on the left bank.

516. Locks, if required, would extend be-

neath the left approach of the highway bridge and connect to the Minor Channel above the power house.

517. The reservoir site is located in a rough region covered with a fair growth of small timber. Small areas of tillable land would be flooded at normal forebay level. The town of Marcus, and about 15 miles of the Great Northern Railway tracks, would be inundated, including two railroad bridges, one crossing the Columbia River at Marcus and the other crossing the Kettle River about 3 miles above its mouth at Boyds. Three miles of logging railroad, including a bridge across the Kettle River, would also be inundated.

518. A bridge at Northport, 31 miles above the dam site, constructed by the Great Northern Railway, used as a highway [131] bridge since 1924, has sufficient clearance for all ordinary floods, but would obstruct the assumed maximum flood of 875,000 second-feet. For construction purposes, it was planned to build a branch line about 5 miles long to connect with the Great Northern Railway near the station at Meyers Falls.

519. e. Economic features.—The principal items of construction and the estimated capital cost of the project are shown in table no. 106. The cost of locks and other navigation features in connection with the power project are not shown herein, but will be given later in chapter

II, under "Combined Uses." Note that the total estimated cost per kilowatt of installed capacity is sixty-seven dollars for public development, and seventy dollars for private development. The difference in cost is due to different rates of interest used during construction.

Table No. 106—Estimate of the capital cost of development at Kettle Falls site for an installed capacity of 447,700 kilowatts.

Preliminary expense	\$ 871,500
Construction railroad	85,000
Reservoir	3,962,000
River diversion	350,000
Dam	3,941,175
Power-house	4,024,800
Hydraulic equipment	3,750,000
Electrical equipment	3,514,445
Switching station	370,000
Miscellaneous equipment	75,000
Permanent buildings	40,000
Tailrace	1,519,000
	[132]
Contingencies, 10 percent.....	\$ 2,250,292
Total field cost	24,753,212
Overhead, 12½ percent	3,094,153
Total construction cost	<u>27,847,365</u>

For public development :

Total construction cost.....	27,847,365
Interest charged during construction, 8 percent	2,227,783
Total capital cost.....	30,075,148
Capital cost per kilowatt.....	67

For private development :

Total construction cost.....	27,847,365
Interest charged during construction, 12 percent	3,341,679
Total capital cost.....	31,189,044
Capital cost per kilowatt.....	70

520. Table no. 107 shows the annual operating cost for both public and private development. Note that this cost is 6.3 percent of the capital cost for public development, and 8.5 percent of the capital cost for private development. Plate no. 42² shows graphically the cost per kilowatt-hour of energy generated for plant capacity factors varying from 10 to 100 percent. Note that the cost per kilowatt-hour for a 50 percent plant capacity factor is 1 mill for public development, 1.4 mills for private development for an annual operating cost of 8.50 percent of the capital cost, as derived from table no. 107, and 2 mills for private development for an annual operating cost of 12.5 percent of the capital cost, as frequently used by the public utility companies. [133]

²Not printed.

Table No. 107.—Estimate of annual cost of power production at Kettle Falls with an installed capacity of 447,700 kilowatts.

	Public development	Private development
1. Investment cost:		
Lands and water rights	\$10,605,359	\$10,998,151
Dam and substructures.....	5,955,665	6,176,246
Subtotal "A"	16,561,024	17,174,397
Power plant machinery and superstructure	13,514,124	14,014,647
Total development capital cost	30,075,148	31,189,044
2. Basis of annual cost:		
(a) Return or interest in per- cent of capital cost.....	4	6
(b) Amortization of bonds, 40- year sinking fund basis in percent of capital cost ..	1.05	0
(c) Depreciations:		
(1) Lands and water rights in percent of capital cost	0	0
(2) Dam and substruc- tures, 100-year sink- ing fund basis, in percent of capital cost	0.08	0.018
(3) Power plant machin- ery and superstruc- ture, 30-year sinking fund basis, in percent of capital cost ..	1.78	1.26
(d) Taxes, in percent of cap- ital cost	0	1.5

	Public development	Private development
(e) Maintenance and operation expense including 10 percent of cost of labor and material for general expense	\$ 148,616	\$ 148,616
3. Total annual cost:		
Items included in subtotal "A":		
Interest or return.....	662,441	1,030,464
Amortization	173,891
Depreciation	4,764	1,111
		[134]
Taxes	257,616
Subtotal	841,096	1,289,191
Power Plant:		
Interest or return.....	540,565	840,879
Amortization	141,898
Depreciation	240,551	176,584
Taxes	210,219
Maintenance and operation	148,616	148,616
Subtotal	1,071,630	1,376,298
Total project:		
Interest or return.....	1,203,006	1,871,343
Amortization	315,789
Depreciation	245,315	177,695
Taxes	467,835
Maintenance and operation..	148,616	148,616
Total annual cost.....	1,912,726	2,665,489
Annual operating cost in percent of capital cost.....	6.3	8.5

2. Earlier Plans of Development

521. The Washington Water Power Co. made application to the Federal Power Commission on April 4, 1925, for a license to develop the site in pursuance of a preliminary permit issued July 26, 1922. Their plans called for a normal forebay elevation of 1,245 feet, which would back water up to the Little Dalles site and create a maximum head of 80 feet at minimum flow.

522. a. Principal works proposed. — As planned in the application for license, a dam would be constructed in the main [135] channel above the upper falls, about midway of Hayes Island, thence an abutment section would extend downstream to the dam crossing minor channel at the south end of the island. Thence, another abutment section would cross the peninsula to connect with the power house. The major dam was designed with seventeen gate openings, each 50 feet wide, fourteen, 45 feet high, and three, 22.5 feet high. The minor dam provided for 6 gate openings, 40 feet wide, and one 20 feet wide, all of which would be 20 feet high. The total spillway capacity would be approximately 825,000 second-feet.

523. b. Power.—The licensee proposed to develop 150,000 continuous and 80,000 secondary horsepower, by stages. A total of 8 units was proposed, the first 4 to be propeller-type tur-

bines; the other 4 might be either propeller or Francis-type turbines. The generators were to be rated at 27,000 kilovolt-amperes, 90 percent power factor, 11,000 volts, 3-phase, 60-cycle, and 128.6 revolutions per minute. The voltage was to be stepped up to 154,000 volts by a bank of 24 transformers, each of 9,000 kilovolt-amperes capacity.

524. c. Estimated cost.—The estimated cost of the complete development, to be made in 10 stages is approximately \$110 per kilowatt.

The Court: We have got to figure out the amount of the verdict on the tax portion of it. Have you worked out that?

Mr. Keith: Mr. Stoutemyer has been working on that, Your Honor. He would be in better position to state.

The Court: I just wanted it figured out before we got through here so we won't lose any time.

Mr. Paine: Now do you want to mark this for identifica- [136] tion? (Document taken from sealed envelope. Document marked Defendant The Washington Water Power Company's Exhibit for identification No. 1.)

The Court: Since there are no other parties, can't it be stipulated with the Clerk that all of the exhibits offered by The Washington Water Power Company can be entitled "Defendant's Exhibits"

and they can be distinguished from the other exhibits, which say "Defendant Ferry County" and "Defendant Stevens County"? There is no use writing in "Washington Water Power Company" on each exhibit. Let the record show that any exhibits which say "Defendant's Exhibit," whatever the number is, are the exhibits offered by the defendant The Washington Water Power Company. Is that satisfactory?

Mr. Keith: Yes, that is satisfactory, Your Honor.

Offer of Proof No. 29

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers in evidence Defendant's Exhibit for identification 1, being a copy of the preliminary permit for Project No. 229 granted by the Federal Power Commission to the defendant, The Washington Water Power Company, to prove the issuance of said preliminary permit for Project No. 229 by the Federal Power Commission to the defendant, The Washington Water Power Company. Said permit for Project No. 229 being Defendant's identification No. 1, is hereby offered in evidence in connection with this offer of proof and as one of the documents covered by the stipulation now on file herein, the terms of which stipulation are likewise made part of this offer of proof.

Mr. Keith: Objected to on the general grounds.

The Court: Objection sustained and exception allowed. [137]

Offer of Proof No. 30

Mr. Paine:

Mr. Paine: I will ask the Clerk to remove from the envelope and mark Defendant's Exhibit 2 for identification, the copy of the application for a Federal Power Commission license. (Exhibit so removed and so marked) I suppose these witnesses can be excused.

Mr. Keith: I will make no objection to the offers of proof that the witnesses are not here at the time their names are called.

The Court: All right.

(Whereupon, the witnesses designated in the offers of proof were excused and the jury was excused until Tuesday morning, September 23, 1941.)

Mr. Paine: Comes now the defendant, The Washington Water Power Company, and offers in evidence a copy of application for a Federal Power Commission license, Defendant's Identification No. 2, for the purpose of showing said application was made to the Federal Power Commission, said copy of said application being marked Defendant's Exhibit 2 for identification, and is hereby offered in evidence in connection with this offer of proof as one of the documents covered by the stipulation re: evidence now on file herein, and deposited

with the Clerk of the court under the terms of the said stipulation.

Mr. Keith: Objected to on the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 31

Mr. Paine:

Comes now the defendant, The Washington Water Power Com- [138] pany, and offers to prove by the witness W. F. Miller, who is present in the court room and has been sworn as a witness, that the witness, W. F. Miller, is the comptroller of The Washington Water Power Company and as such it is a part of his duties to keep a record of all of the expenditures and costs of the Washington Water Power Company; that the books and records of The Washington Water Power Company show that the said company has expended the sum of \$156,043.33 for the acquisition of the lands at Kettle Falls; that after deducting from said amount the stipulated and agreed value, to-wit, \$7,610, the value of the land not taken by the Government, which was originally purchased as a part of the Kettle Falls tract, the net original investment as represented by the purchase price of the land involved in this proceeding was on the 9th day of December, 1939, exclusive of interest and taxes, the sum of \$148,433.33.

Mr. Keith: Objected to upon the general ground and upon the special ground that the investment of

the company in the land not taken is not proper material testimony as to the fair market value of the lands which were taken.

The Court: Sustain the objection on the general ground and allow an exception, and overrule the special objection.

Offer of Proof No. 32

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness W. F. Miller, who is present in the court room and who has been sworn as a witness, that the books and records of the Washington Water Power Company show that in addition to said sum expended for the purchase price of said land there has been expended for exploration, general engineering, surveying and other work in connection with [139] the development of the project the further sum of \$317,352.64.

Mr. Keith: Objected to upon the general ground and the special ground that the additional investment and cost to the landowner is not material on the question of the fair market value of the land.

The Court: Sustain the general objection and allow an exception, and overrule the special objection.

Offer of Proof No. 33

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness W. F. Miller, who is present in the court room and who has been sworn as a witness, that in addition to the sums invested in the purchase price of said lands and for exploration, general engineering, surveying and other work in connection with the development of the Kettle Falls project, the sum of \$66,832.90 was spent for taxes and fees in connection with water rights on said Kettle Falls hydro-electric project.

Mr. Keith: Objected to on the general ground and upon the special ground that the expenditures of the landowner by way of taxes paid and fees paid for water rights are not material on the question of the fair market value of the lands taken.

The Court: Sustain the general objection and allow an exception, and sustain the special objection and allow an exception.

Offer of Proof No. 34

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness W. F. Miller, who is present in the court room and who has been sworn as a witness, [140] that the sum of \$156,043.33 paid by the defendant. The Washington Water Power Company, for the

lands involved in this proceeding was a reasonable price for said land at the time it was purchased by the defendant, The Washington Water Power Company, in 1921.

Mr. Keith: Objected to on the general ground and objected to on the special ground that the witness Miller is not shown to be competent to testify to the fair market value of the lands at the time of their acquisition.

The Court: Would there be testimony showing what knowledge the comptroller of the company has? He might not have any knowledge of the reasonable market value of lands. Comptrollers usually don't have.

Mr. Paine: I will be frank with the Court. I won't have any special qualification of Mr. Miller other than his comptrollership.

The Court: I will sustain the general objection and allow an exception and sustain the special objection and allow an exception.

Offer of Proof No. 35

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the Witness K. M. Robinson, who is present in the court room and who has been called and sworn as a witness, that the witness K. M. Robinson is president of The Washington Water Power Company, owner

of the land sought to be condemned; that he has been president of said company since June, 1938; that prior to said time he was president of the Idaho Power Company located in southern Idaho; that he has [141] spent his entire life since the age of eighteen in the power business, that he is familiar with the lands involved in this proceeding which are the subject of this litigation; that said lands were purchased by The Washington Water Power Company in 1921, for the sum of \$156,043.33; that the lands purchased at that time consisted of a tract of approximately 800 acres; that all of said lands at that time had little value for agriculture or timber purposes.

Mr. Keith: Objected to on the general ground and upon the special ground that the cost of the land to The Washington Water Power Company is not material upon the question of their fair market value.

The Court: Sustain the general objection and allow an exception; overrule the special objection.

Offer of Proof No. 36

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that when the said land was acquired by The Washington Water Power Company, the purchase price

thereof was fixed by the buyer and seller on the basis of suitability and adaptability of said land for the purpose of building a dam and hydro-electric development and on the reasonable likelihood that said dam could and would be built.

Mr. Keith: Objected to on the general ground and upon the special ground there is nothing in the offer of proof that shows that the witness Robinson participated in or had any knowledge concerning the basis upon which the sale of the lands in question was made. [142]

The Court: How could Mr. Robinson know about what happened in 1921?

Mr. Paine: Well, only from his knowledge as president of the company and the transactions and official documents in the possession of the company which he as president has reviewed and is familiar with. Of course, the president is dead and most of the Power Commission are dead who were in existence at that time. It seems to me that he can testify to that fact from his familiarity with the records and official correspondence of the company. It would be a question of proving on cross-examination as to whether or not they were bought for agricultural purposes rather than hydro-electric purposes.

The Court: I will sustain the objection on the general ground and allow an exception and overrule the objection on the special ground.

Offer of Proof No. 37

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that on December 9, 1939, The Washington Water Power Company had grown to a point where its ability to produce electric energy was less than the demands of the customers. In the ordinary course of events a power company such as The Washington Water Power Company must make arrangements to provide additional sources of power to take care of increasing demands; that on December 9, 1939, it was imperative that the company develop an additional source of power; that had the Government not authorized and established the Grand Coulee project, The Washington Water Power Company would have continued with the [143] development of and entered upon the construction of the power project at Kettle Falls on or before December 9, 1939.

Mr. Keith: The offer is objected to on the general ground.

The Court: I will sustain the objection on the general ground and allow an exception.

Offer of Proof No. 38

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that he is familiar with power sites in the northwest and he knows what such sites have been bought and sold for, and by reason of his experience as president of the Idaho Power Company and The Washington Water Power Company, he is familiar with power sites and the prices for which they are bought and sold. Due to his connection with the power industry he is familiar with what other companies in the northwest have paid to secure power sites.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection, and allow an exception.

Offer of Proof No. 39

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room, and who has been sworn as a witness, that The Washington Water Power Company has expended the sum of \$148,433.33 for the purchase of the lands involved in this proceeding, and in addition to that The Washington Water Power Company has expended the sum of \$317,352.64 for exploration, [144]

general engineering, surveying and other work in connection with the development of the project; that all such expenditures represent a legitimate net investment of The Washington Water Power Company in the sum invested in the property; that the total legitimate net investment on December 9, 1939, was \$465,785.97; that had The Washington Water Power Company been granted a license to develop this project by the Federal Power Commission it would have been permitted to capitalize its legitimate net investment in the property, but would have been permitted to capitalize or earn no sum in excess of its legitimate net investment in the property.

Mr. Keith: Objected to on the general ground and in addition upon the special ground that the expenditures of the company in connection with the acquisition and development of this land and this legitimate net investment, so-called, in the lands are not material on the question of fair market value.

The Court: Sustain the objection on the general ground and allow an exception; overrule the special objection.

Offer of Proof No. 40

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room

and who has been sworn as a witness, that interest on the sum of the total legitimate investment of \$465,785.97 for a period of three years prior to December 9, 1939, at the rate of six percent per annum, amounted to \$83,841.47; that the total net investment plus interest for a three-year period amounted to \$549,627.44.

Mr. Keith: Objected to upon the general ground and upon the special ground that the evidence offered is not material [145] upon the question of fair market value and that the interest at six percent per annum for a period of three years prior to December 9, 1939, has no tendency to establish the fair market value.

The Court: Sustain the objection on the general ground and allow an exception, and sustain the objection on the special ground and allow an exception.

Mr. Paine: I might just say for Your Honor's consideration that the theory on which we are interested on the second ground is that the rules and regulations of the Federal Power Commission under the Federal Power Act permits the capitalization of the cost during the three-year period prior to construction and during the period of construction, legitimate interest at the rate of six percent to be capitalized on those projects, our theory being that one of the elements that would enter into the determination of a buyer would be the fact that if he got his property and had to get his license he would be limited by the rules and regulations of

the Federal Power Act as to the amount of money at which he could capitalize his purchase and that that element would be an element which the buyers would consider and would be an element entering into the fair market value in that way where it would not enter into the fair market value of a piece of property where it wasn't subject to the restrictions as to capitalization and use that under the Federal Power Act applies. The general rule is that you can't add the interest as an element of the market value of your property in an ordinary building and that sort of thing, our theory being that if the value didn't change with the granting of the license that these facts are known and taken into consideration by the buyer and that we would be entitled to say [146] what the minimum capitalized value that he could put in would be and that would enter into his thought as to what would be fair and what he could afford to pay.

The Court: I will let my ruling stand and allow an exception.

· Offer of Proof No. 41

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that he is president of the Washington Water Power Company, the owner of the lands involved in this pro-

ceeding; that he is familiar with the fair market value of those lands on December 9, 1939; that taking into consideration all of the uses for which the lands are suitable and adaptable and to which they may be devoted in the reasonably near future, and taking into consideration the likelihood or lack of likelihood that the necessary permits and consents from the Federal Government could be obtained to use said lands for a dam site or hydro-electric development, that in his opinion the reasonable market value of this property on December 9, 1939, was \$549,627.44; and further, that he was president of the company on December 9, 1939 as well as the present time.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 42

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that he is a civil and hydraulic engineer employed by Ebasco [147] Services, Incorporated, 2 Rector Street, New York City; that he is a licensed professional engineer in the State of New York, a member of the American Society of Civil Engineers and a member of the committee on power plant design and

has written papers on power plant investigations and design for both the American Society of Civil Engineers and the American Society of Mechanical Engineers; that he became a member of the engineering department of the Electric Bond and Share Company in 1912, and since that time he has been connected with this company or its service companies continuously, rendering services to a large number of client public utility companies, including The Washington Water Power Company, since 1928; that he has held successively the positions of draftsman, designer, assistant hydraulic engineer and civil and hydraulic engineer; that during this period of twenty-nine years he has worked on the design and construction of over forty-five hydro-electric developments, having a total in solid capacity of 675,000 kilowatts, and the design and construction of the condensing water works, foundations and building superstructures for approximately 1,000,000 kilowatts of steam and Diesel electric stations in sixteen states and ten foreign countries; that at the present time he is in responsible charge of the design work on three hydro-electric stations in foreign countries and the civil engineering design features involved in the installation of thirteen additional steam-electric units in this country, having an approximate capacity of 400,000 kilowatts; that he has participated in, supervised and directed a great many studies regarding hydro-electric and steam-electric developments to deter-

ceeding; that he is familiar with the fair market value of those lands on December 9, 1939; that taking into consideration all of the uses for which the lands are suitable and adaptable and to which they may be devoted in the reasonably near future, and taking into consideration the likelihood or lack of likelihood that the necessary permits and consents from the Federal Government could be obtained to use said lands for a dam site or hydro-electric development, that in his opinion the reasonable market value of this property on December 9, 1939, was \$549,627.44; and further, that he was president of the company on December 9, 1939 as well as the present time.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 42

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that he is a civil and hydraulic engineer employed by Ebasco [147] Services, Incorporated, 2 Rector Street, New York City; that he is a licensed professional engineer in the State of New York, a member of the American Society of Civil Engineers and a member of the committee on power plant design and

has written papers on power plant investigations and design for both the American Society of Civil Engineers and the American Society of Mechanical Engineers; that he became a member of the engineering department of the Electric Bond and Share Company in 1912, and since that time he has been connected with this company or its service companies continuously, rendering services to a large number of client public utility companies, including The Washington Water Power Company, since 1928; that he has held successively the positions of draftsman, designer, assistant hydraulic engineer and civil and hydraulic engineer; that during this period of twenty-nine years he has worked on the design and construction of over forty-five hydro-electric developments, having a total in solid capacity of 675,000 kilowatts, and the design and construction of the condensing water works, foundations and building superstructures for approximately 1,000,000 kilowatts of steam and Diesel electric stations in sixteen states and ten foreign countries; that at the present time he is in responsible charge of the design work on three hydro-electric stations in foreign countries and the civil engineering design features involved in the installation of thirteen additional steam-electric units in this country, having an approximate capacity of 400,000 kilowatts; that he has participated in, supervised and directed a great many studies regarding hydro-electric and steam-electric developments to deter-

mine their value, economy and feasibility in interconnected power systems; that he graduated from the civil [148] engineering department of Worcester Polytechnic Institute in 1912; that at present he is in charge of the civil engineering department of Ebasco Services, Incorporated, and is responsible for hydraulic and civil engineering investigations, preliminary studies, design and engineering supervision of construction of structures used in the extension and operation of public utility properties; that there are over 100 engineers and draftsmen directly under his supervision; that his department supervises and constructs field investigations of undeveloped hydro-electric projects, prepares reports and makes economic studies so as to advise the management of the various client public utilities companies in regard to the acquisition, development, extension and operation of public utility properties; that he has personally conducted a great number of investigations of potential power sites and that in recent years the preparation of reports and economic studies has constituted a very appreciable percentage of the total work under his supervision; that he has investigated over 100 potential water power developments and compared them in many cases with alternative sources in order to determine the relative economic merit of these alternative sources; that since 1913 he has worked on several studies in connection with additional sources of power for the interconnected client companies in Oregon, Washington, Montana, Idaho and Utah.

Mr. Keith: I am willing to stipulate as to the qualifications of the witness. It seems that there is no offer of proof to prove anything there other than his qualifications. I am willing to stipulate that he is a qualified engineer.

The Court: I would overrule an objection. I think they are entitled to have their case before the Circuit Court on the [149] basis that they are capable of proving what they say.

Mr. Keith: I think so, too.

Offer of Proof No. 43

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects subject to Federal license; that he has appeared and testified before such commissions and knows the practices of the Commission in determining the legitimate net investment in connection with such projects; that he knows the amount of the expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project; that in his opinion all of such expenditures,

amounting to the sum of \$465,785.97, were legitimate, proper, and fair and reasonable.

Mr. Keith: Objected to on the general ground and upon the special ground that the opinion of the witness as to the reasonable expenditures in connection with the development of the property is not admissible or has no tendency to prove or disprove the fair market value of the land being taken in this proceeding.

The Court: I will sustain the general objection and allow an exception, and overrule the special objection.

Offer of Proof No. 44

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is [150] present in the court room and who has been sworn as a witness, that he is familiar with the generating facilities, power resources and the growth of load of The Washington Water Power Company; that he has participated in a number of studies to determine what additional economical power sources are available to The Washington Water Power Company; that some of the investigations and studies leading up to the development, as well as the designs, of the Hood River hydro-electric plant of the Pacific Power and Light Company, the Lewiston hydro-electric plant of The Washington Water Power Company, the Morony

and Flathead hydro-electric plant of the Montana Power Company and the Ariel hydro-electric plant of the Inland Power and Light Company were carried out under his supervision; that utilizing United States geological survey records of stream flow of the Columbia River at Kettle Falls covering a period from 1913 to 1939, and utilizing the hydraulic head to be developed at that site, the average monthly power available at Kettle Falls was determined for the initial, intermediate and ultimate stages of said development.

Mr. Keith: Objected to on the general grounds.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 45

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that he studied the load of The Washington Water Power Company, of eight interconnected public utilities in the northwest, and of the entire public utility load in the States of Montana, Washington and Oregon over the entire period for which records [151] are available; that the output of the Kettle Falls plant would fit into the load requirements of The Washington Water Power system and would furnish additional low-cost power to its neighboring interconnected

systems; that under increasing load conditions which were apparent as early as 1937, the construction of the initial stage of Kettle Falls would have been undertaken at about that time; that this need for additional capacity and energy is proven by the purchases of power which The Washington Water Power Company has made from the Montana Power Company, Puget Sound Power and Light Company and from the Northwestern Electric Company since 1937; that under the present rate of load growth the output of the initial installation at Kettle Falls would have been absorbed by the inter-connected systems within approximately three years; that Kettle Falls is the one site on the Columbia River that lends itself best to levelopment in stages so as to meet growing load demands without entailing excessive investment costs when the plant is first built; that general layout plans have been prepared for the initial development, intermediate development and ultimate development; that the initial development will develop 42,000 kilowatts, the intermediate development 140,000 kilowatts, and the ultimate 360,000 kilowatts; that these plans have been prepared in sufficient detail to determine the present day cost of each stage of development; that the present day cost of the initial stage of development would be \$10,735,000; that the additional cost for the intermediate stage would be \$9,674,000, and an additional \$10,500,000 for the ultimate stage, making a total cost for the initial stage of \$10,735,000, for the second stage, \$20,409,000, and the ultimate

development, \$30,909,000; that for the ultimate [152] development the cost per kilowatt would be eighty-six dollars; that adding \$3,205,000 for the lands and rights not owned by The Washington Water Power Company would be \$34,114,000, or the equivalent of \$95.70 per kilowatt of installed capacity; that the present day costs are higher than the costs in 1939, but present day costs have been used because the construction period of such dam would be in the neighborhood of two to three years; that the cost of a 154 kilowatt transmission line from the site to Spokane would be \$1,381,400, including terminal stages facilities in Spokane; that the cost of energy from the initial stage development would be 2.3 mills at 100 percent load factor and 3.85 mills at sixty percent load factor; that the cost of energy for the combined initial and intermediate stages would be approximately 2.16 mills at sixty percent load factor; that the cost of energy for the ultimate development would be approximately 1.40 mills at sixty percent load factor; that the cost of power from Kettle Falls, even for the initial stage, would be reasonable and considerably below what the company has paid since December 1, 1939, and now pays for purchased power.

Mr. Keith: Objected to upon the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 46

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that based upon his experience in analyzing and evaluating water power sites on navigable and non-navigable streams, it is his judgment that the undeveloped Kettle Falls site in 1939 [153] had a value considerably in excess of the money already invested in the site, to-wit, \$465,785.57.

Mr. Keith: Objected to on the general ground.

The Court: Objection sustained; exception allowed.

Offer of Proof No. 47

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that the completion of the initial stage of development (42,000 kilowatts) would cause a substantial increase in the value of the site to The Washington Water Power Company.

Mr. Keith: Objected to on the general ground and upon the special ground that the increase in value due to the completion of the initial unit would not

have any tendency to prove the fair market value in December, 1939.

The Court: Sustain the objection on the general ground and allow an exception, and overrule the objection on the special ground.

Offer of Proof No. 48

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that the cost of power from Kettle Falls initial stage would be reasonable and considerably below what the company has paid on and since December 9, 1939, and now pays for purchased power.

Mr. Keith: Objected to on the general ground and upon the special ground that the cost of power development in that project would be less than the company is paying now has no [154] tendency to establish a fair market value.

The Court: Sustain the general objection and allow an exception, and overrule the special objection. It seems to me that goes to the question of whether the company was ready and willing and able to develop this property in 1939.

Offer of Proof No. 49

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that the uplands involved herein, because of their geographic formation and topographic features, making them adaptable for the support of hydro-electric structures, have a greater value for use in connection with the Kettle Falls project than have lands which are necessary for reservoir purposes in connection with this hydro-electric project.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 50

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921.

Mr. Keith: Objected to on the general ground

and the special ground that the price paid in 1921 is not material on [155] the question of the fair market value in 1939.

The Court: Sustain the objection on the general grounds and allow an exception; sustain the objection on the special ground and allow an exception.

Offer of Proof No. 51

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that the lands of the defendant, The Washington Water Power Company, involved in this proceeding and for which the jury is to make an award in this proceeding, did, on the 9th day of December, 1939, have an enhanced market value because of their extent, particular location and relation to the Columbia River, the rock formation on said lands and other characteristics which might make said lands suitable and adaptable for a hydro-electric power development, and because of the value said lands would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands.

Mr. Keith: Objected to on the general grounds.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 52

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that he has lived in Spokane since 1887, and has been connected with large business enterprises, including the purchase, developing and maintaining of mining properties and power companies, [156] electric railroads and similar enterprises; that he has bought and sold six or seven power sites in the northwest; that he is generally familiar with all the power sites in eastern Washington, Northern Idaho and British Columbia and he was one of the early owners of the Kettle Falls site, and he knows about the various sales of the Kettle Falls site and is familiar with the site and with the purposes for which it can be used; that he is familiar with the fair market value on December 9, 1939, of the uplands of The Washington Water Power Company, located at Kettle Falls, involved in this proceedings, taking into consideration all the uses for which they are reasonably suitable and adaptable; that in his opinion the fair market value of said uplands of The Washington Water Power Company on December 9, 1939, was the sum of \$500,000.

Mr. Keith: Objected to upon the general ground.

The Court: Well, I suggest, Mr. Paine, that you separate that offer. On the other witnesses you had

their qualifications and there was no objection to them. Then on their subsequent testimony there was objection.

Mr. Paine: All right. I will break off the portion reading "and is familiar with the site and the purposes for which it can be used, as one offer, No. 52.

The Court: Do you object to the Offer 52?

Mr. Keith: If it ends at the point "and is familiar with the purposes for which it can be used," I have no objection and will stipulate that the witness Graves would so testify.

The Court: Then Defendant's No. 53 is the rest of it?

Mr. Paine: Yes.

Mr. Keith: I object to what is now No. 53 and what was [157] originally the last part of 52 upon the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 54

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defend-

ant, The Washington Water Power Company in 1921.

Mr. Keith: Objected to on the general ground and objected to on the special ground that the fair market value of the lands in 1921 has no tendency to establish the fair market value of the lands on December 9, 1939.

The Court: I will sustain the objection on the general ground and allow an exception, and sustain the objection on the special ground and allow an exception. There is a distinction between the amount that they paid and whether or not it is a fair and reasonable value. One reason I would not permit the testimony as to the amount paid would be that it would meet with an argument such as was made by Mr. Keith, that they were just up there to get the prior right. I think they were there in good faith, that they paid \$150,000 and that it was a substantial sum of money, but the question of whether or not that was the fair and reasonable market value in 1921 has no bearing upon the fair market value in 1939. I will sustain the objection because of the fact that it goes to the value in 1921.

Mr. Paine: Our reason for offering it was that the cases [158] seemed to indicate that the prior sales of the identical property are always admissible in evidence unless so far removed in point of time as to make their admission of no value, and that their use for power sites is contradistinctive from ordinary wheat lands or something of that sort. We will offer to prove by Mr. Graves that the lapse of

time from 1921 to 1941 is not a disqualifying factor, that power sites generally have become scarcer as the growth of the communities increased, and the demand for them have become greater and they have tended to increase in value over what they were worth at that time. Most of the authorities hold that the sale of the identical property is admissible unless it is so far removed as to throw no light on the value of the property at the present time, and we felt that on a power site such as this a great deal longer lapse of time is permissible than in the sale of wheat or stock or general farms, and that the sale price did reflect the value of the land. It is one element at least for the jury to consider.

The Court: I will sustain the objection and allow an exception.

Offer of Proof No. 55

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939 than it was during the year 1921, and that power site values were generally higher in the State of Washington on December 9, 1939 than they were during [159] the year 1921.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 56

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the land as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete said hydro-electric project could be obtained at a reasonable cost in the reasonably near future;

that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutment for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to [160] sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000.

Mr. Keith: Objected to on the general grounds.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 57

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that the lands of the defendant, The Washington Water Power Company involved in this proceeding and for which the jury is to make an award in this proceeding, did on the 9th day of December, 1939, have an enhanced market value because of their extent, particular location and relation to the Columbia River, and the rock formation on said lands, and because of the value said lands would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands.

Mr. Keith: Objected to on the general grounds.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 58

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that the witness J. P. Graves purchased the lands involved in this action in 1906 for the sum of \$80,000 immediately upon the lands in Ferry County being released to public ownership upon the opening of the Colville Indian Reservation; that the lands [161] purchased by him at that time were purchased for the purpose of their use as abutments for hydro-electric developments or dams in the Columbia River; that the lands at that time had little or no value for agricultural, grazing or other purposes; that the lands were sold by him in the year 1912 to the Granby Consolidated Mines Company for the sum of \$100,000; that the lands so sold were sold for the purpose of use as lands for the abutment of a power site development at Kettle Falls to be made by the Granby Consolidated Mining Company for use in connection with their copper mining activities; that he was a member of the Board of Directors of the Granby Consolidated Mining Company; that the Granby Company sold these lands to The Wash-

ington Water Power Company in the year 1921 for the sum of approximately \$150,000.

Mr. Keith: Objected to upon the general ground and upon the special ground that the purpose for which the lands were purchased by the witness Graves or the purpose for which the lands were sold by the witness Graves to the Granby Company and the figures on which the several sales were consummated are not admissible as having any tendency to establish the fair market value of the lands on December 9, 1939.

The Court: Sustain the objection on the general ground and allow an exception, and overrule the objection and allow an exception on the special ground.

Offer of Proof No. 59

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that the witness O. B. Shay is right-of-way agent for the [162] Puget Sound Power and Light Company, residing at Wenatchee, Washington; that he has been dealing in the sale and purchase of lands in connection with his duties with the Puget Sound Power and Light Company for many years; that he is familiar with the market value of land for general purposes and for power site purposes in eastern Washing-

ton; that he is familiar with the lands involved in this proceeding and for which the jury is to make an award in this proceeding; that he was familiar with and knew the market value of said property on December 9, 1939.

Mr. Keith: I am going to object to that offer of proof on the ground that the qualifications of the witness as an expert and the determination of values such as are involved in the offer of proof are not sufficient to conform to the offer.

Mr. Paine: Well, maybe I can extend it a little bit. The defendant will show further that Mr. O. B. Shay—will offer to prove by the witness O. B. Shay, that his familiarity with power site values arose from his connection with the purchase of the property in connection with the power site development by the Puget Sound Power and Light Company at Rock Island on the Columbia River in the State of Washington, which project was a licensed Federal project; that he has also studied and is familiar with values and the sale price of the power site located at Chelan, owned by The Washington Water Power Company, the power site located on the Spokane River, the power site located and owned by the Inland Power Light Company at Ariel in the State of Washington.

Mr. Keith: I renew my objection.

The Court: Overrule the objection.

Mr. Herman: The objection having been overruled, will Mr. [163] Keith stipulate that the wit-

ness will so testify or will we call him and put him on the stand and have him so testify?

Mr. Keith: I will stipulate that he will testify to the points which have been mentioned by Mr. Paine.

The Court: Very well, let the record show.

Mr. Keith: May we have an exception to Your Honor's ruling?

The Court: Exception allowed.

Offer of Proof No. 60

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that in the opinion of the said witness the said land is suitable and adaptable for use in connection with the development of hydro-electric power, and that in his opinion said property would have been devoted to said use on the 9th of December, 1939, or within the reasonably near future thereafter, had it not been for the Act passed by Congress on August 30, 1935, authorizing and approving the Grand Coulee Dam.

Mr. Keith: We object to that on the general ground and upon the special ground that the testimony offered would be merely a conclusion of the witness.

The Court: Sustain the objection on the general ground and allow an exception; sustain the objection on the special ground and allow an exception.

、 Offer of Proof No. 61

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is [164] present in the court room and who has been sworn as a witness, that the witness is familiar with the Rock Island site owned by the Puget Sound Power and Light Company on the Columbia River near Wanatchee, Washington; that said power site is similar in all essential respects to the power site of the defendant at Kettle Falls, Washington; that said power site is located on the same river, which is a navigable stream; that it was necessary to secure permission from the Federal Power Commission to develop the Rock Island site; that one of the elements to be taken into consideration in determining the value of land adaptable or suitable for a power site is the amount of horsepower which it would be reasonably possible to develop at such site; that, generally speaking, the construction problems and the available market conditions at the Rock Island site and the Kettle Falls site were on December 9, 1939 so familiar that the relative value per horsepower for each site is the same; that the witness is familiar with the prices that were actually paid for the lands in the Rock Island dam site; that the lands on either side of the Columbia River on which stand the abutments of the Rock Island Dam, and the island in the middle of the river at said Rock Island damsite, were purchased for \$120,000 by the Puget Sound Power and

Light Company in 1929; that the said lands on either side of the river on which stand the abutments of the Rock Island dam were purchased by the Puget Sound Power and Light Company before it received any license from the Federal Power Commission to develop any hydro-electric power at this point.

Mr. Keith: Objected to on the general ground and upon the special ground that the testimony of the witness as to the acquisition of the power site at Rock Island dam does not have [165] any tendency to establish the fair market value of the site in this case or the lands in this case; furthermore, upon the special ground that the fact that the lands at Rock Island were purchased prior to the issuance of a license by the Federal Power Commission is not material in the determination of the fair market value of the lands.

The Court: Sustain the objection on the general grounds and allow an exception; overrule the objection on the special ground.

Offer of Proof No. 62

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that in the opinion of said witness the fair market value of said prop-

erty on December 9, 1939, taking into consideration all of the uses for which it was available and adaptable, and to which it might be put in the reasonably near future after said date, was the sum of \$480,000.

Mr. Keith: Objected to on the general grounds.

The Court: Sustain the objection and exception allowed.

Offer of Proof No. 63

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that the lands of the defendant, The Washington Water Power Company, involved in this proceeding and for which the jury is to make an award in this proceeding did on the 9th day of December, 1939, have an enhanced market value because of their [166] extent, particular location and relation to the Columbia River, the rock formation on said lands, and other characteristics which might make said lands suitable and adaptable for a hydro-electric power development, and because of the value said lands would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 64

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that in the absence of unusual conditions, uplands adaptable and suitable for supporting abutments for dams have greater values for use in connection with hydro-electric projects than have lands which are necessary for reservoir purposes in connection with such hydro-electric projects.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and allow an exception.

Offer of Proof No. 65

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water [167] Power Company in 1921.

Mr. Keith: Objected to on the general ground and objected to on the special ground that the fair

market value of the lands in 1921 has no materiality to the market value of the lands on December 9, 1939.

The Court: Sustain the objection on the general ground and allow an exception; sustain the objection on the special ground and allow an exception.

Offer of Proof No. 66

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939 than it was during the year 1921, and that power site values were higher in the State of Washington on December 9, 1939, than they were during the year 1921.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and exception allowed.

Offer of Proof No. 67

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that in the opinion

of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not [168] determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the land determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the consideration above set forth by the witness, would in his opinion be as of December 9, 1939, \$480,000.

Mr. Keith: Objected to on the general ground

and objected to on the additional ground that the witness has not established his competency to testify on that question.

The Court: Sustain the general objection and allow an exception; overrule the special objection.

Offer of Proof No. 68

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, [169] and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness, that for twenty-three years he was president of a land company, and during the years 1903 and 1904 was actively engaged in land valuations as Flood Commissioner in the State of New Jersey; has been examiner of lands for the United States Forest Reservation Commission in the acquisition of national forest lands in the Appalachian region of the eastern United States; that he was principal examiner of water power lands withdrawn in the public domain of the west under the Executive Order of 1908, and the Pickett Act of 1910; that as Consulting Engineer for the Pittsburgh Flood Commission he had extensive experience and observation with lands and land prices in western and central Pennsylvania in connection with the extensive reservoir system now being constructed for the protection from floods of Pittsburgh and Ohio River below

Pittsburgh; that he has participated in land studies, negotiations and purchases in connection with the development of many water power sites, and has made extensive studies of land costs and values as between Federal licensed and non-licensed projects; that from 1902 to 1906 he was attached to the U. S. Geological Survey as an engineer; that from 1906 to 1913 he was chief hydraulic engineer; that during his incumbency in that office, land work was carried on in connection with flood surveys and the effect thereof on land values; that for four years he was engaged in the determination of land values for water power production covering many states and rivers of the west. It was part of his duties to designate and inspect lands of the United States along western rivers believed to be suitable for withdrawal as [170] power reserves, and to make recommendation to the Federal Government according to his findings, that is, that in the case of lands not found suitable for water power, they be restored to public entry, and in case they were found suitable, they remain in power site reserve; that he worked on the Columbia River from the Canadian boundary to Pasco; that he is familiar with all of the land and land values on the Columbia River; that he is familiar with the lands involved in this suit and their fair market value for all purposes.

Mr. Keith: The offer is objected to upon the ground that by the terms of the offer the witness Leighton would not testify as to any general or

special familiarity with values of lands in this area or the value of power sites in this area.

The Court: Objection overruled and exception allowed the Government. Will you stipulate that if he were called on the stand that he would so testify?

Mr. Keith: To the extent mentioned in the offer, yes, Your Honor.

Offer of Proof No. 69

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness, that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands [171] taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to

construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands as determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000.

Mr. Keith: Objected to on the general ground and upon the special ground that the qualifications of the witness to testify on the value of land in this area has not been established.

The Court: Sustain the objection on the general ground and allow an exception; overrule the objection on the special ground.

Offer of Proof No. 70

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is [172] present in the court

room and who has been sworn as a witness, that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects upon navigable rivers and Government land; that he has appeared and testified before said Commission in connection with the land costs and legitimate net investment of said projects, including at least thirteen major cases; that he is familiar with the practices of the Federal Power Commission in determining legitimate net investment in Federally licensed projects; that on the average the costs allowed for power site lands has averaged approximately \$39.00 per kilowatt of primary capacity; that the abutment lands necessary for the actual construction of powerhouse facilities are from six to seven times as valuable as the upstream storage lands; that this value has been consistently recognized, allowed and approved by the Federal Power Commission in the licensing of Federal power projects.

Mr. Keith: Objected to on the general ground and the special ground that one not connected with the Federal Power Commission cannot testify as to the policy of that Commission; furthermore, that some of the testimony offered would be purely speculative and constitute a conclusion of the witness as to what might or might not be done.

The Court: Sustain the objection on the general ground and allow an exception; overrule the objection on the special ground.

Offer of Proof No. 71

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness [173] that the lands of the defendant, The Washington Water Power Company, involved in this proceeding and for which the jury is to make an award in this proceeding did, on the 9th day of December, 1939, have an enhanced market value because of their extent, particular location and relation to the Columbia River, the rock formations on said lands, and other characteristics which might make said lands suitable and adaptable for a hydro-electric power development, and because of the value said land would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands.

Mr. Keith: Objected to on the general ground and the special ground that it is incompetent as to the qualifications of the witness.

The Court: Objection sustained and exception allowed on the general ground; overruled on the special ground.

Offer of Proof No. 72

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness

M. O. Leighton, who is present in the court room and who has been sworn as a witness, that he has been familiar with the practices of and the policies of the United States Government for more than forty years; that the policy of the Government in connection with the development of economically feasible power projects upon Government lands or on navigable streams under the control of the Government has been to encourage and promote development of these projects under proper restrictions and licenses; that the likelihood of obtaining necessary permissions and consents to develop these projects is one of the elements considered by [174] prospective purchasers and owners of said sites and is one of the elements entered into in determining the fair market value of the said sites; that he is familiar with the practices and policies of the Federal Power Commission in connection with the granting of licenses for the development of power sites on the Columbia River; that the Federal Power Commission has granted licenses to private capital to own and develop a power site at Rock Island on the Columbia River and that such fact would be given consideration by the purchasers of power site land adjacent to the Columbia River.

Mr. Keith: Objected to on the general ground and on the special ground that the testimony offered is speculative and based upon the opinion of this witness as to the policy of the Federal Power Commission.

The Court: Sustain the objection on the general ground and allow an exception, and overrule the objection on the special ground.

Mr. Herman: At this time, if the Court please, before court adjourns, I have served copies of the proposed instructions and served copies upon opposing counsel. Counsel for the Government told me I would not need copies for them and I believe two copies are all that you require. I hand herewith two copies to the clerk.

(Wherefore, the case was adjourned at 12:15 P. M. on September 22, 1941 to 9:30 A. M. on September 23, 1941, when the trial was resumed and the following proceedings were had:) [175]

Proceedings of September 23, 1941

The Court: Gentlemen, I call your attention to Page 2 of the pre-trial stipulation, Line 8: "It is agreed that on the date of the entry of the judgment on Declaration of Taking herein entered December 9, 1940."

Mr. Paine: I think that we both agree that should be "1939."

The Court: May it be stipulated that the stipulation may be amended?

Mr. Keith: Yes.

Offer of Proof No. 73

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness, that he knows the amount of expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project, including the acquisition of the necessary abutment lands; that the lands involved in this proceeding, including expenditures amounting to the sum of \$465,785.97, in his opinion are legitimate, proper, fair and reasonable and would be allowed as legitimate net investment if said projects were to be licensed.

Mr. Keith: The offer is objected to upon the general ground stated yesterday and upon the special ground that the testimony would be predicated upon the expenditures made by the landowners.

The Court: The objection on the general ground is sustained and exception allowed, and the objection on the special [176] ground is overruled.

Offer of Proof No. 74

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room

and who has been sworn as a witness, that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by The Washington Water Power Company in 1921.

Mr. Keith: Objected to on the general ground and upon the special ground that the fair value of the land in 1921 is not in issue in this proceeding.

The Court: The objection is sustained on the general ground and exception allowed, and the objection is sustained on the special ground and exception allowed.

Offer of Proof No. 75

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness, that he is familiar with power site values generally throughout the United States as of December 9, 1939; that the demand for power sites was greater in the State of Washington on December 9, 1939 than it was in 1921; and that said power site values were higher throughout the United States and in the State of Washington on December 9, 1939 than they were in 1921.

Mr. Keith: Objected to on the general ground and upon the special ground that the offered testi-

mony is obviously based upon [177] the price paid by The Washington Water Power Company in 1921, and therefore is inadmissible as evidence.

The Court: The objection is sustained on the general ground and exception allowed, and the objection is overruled on the special ground.

Offer of Proof No. 76

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the official records and reports of the Federal Power Commission:

That it has been the policy of the Federal Power Commission to encourage the development of power sites upon navigable streams by financially responsible parties.

That where the facts and circumstances surrounding the development of the power site show that the party applying therefor has the necessary financial backing to develop the site, that the amount of electricity can be properly used and disposed of, the policy of the Commission has been to grant such application.

Mr. Keith: Objected to on the general ground and upon the special ground that there is not sufficient identification of the reports and documents of the Federal Power Commission in order to make it possible to determine whether or not such reports indicate any such general policy.

The Court: The objection on the general ground is sustained and exception allowed, and the objection on the special ground is overruled.

Offer of Proof No. 77

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, [178] and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company is a public utility company organized and existing under the laws of the State of Washington; that it is a subsidiary company of the American Power and Light Company and a member of the Electric Bond and Share Company system; that on December 9, 1939, the Washington Water Power Company had sufficient assets and financial backing to have obtained the funds necessary to finance the construction of the Kettle Falls project.

Mr. Keith: Objected to on the general grounds.

The Court: Sustain the objection and exception allowed.

Offer of Proof No. 78

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness

K. M. Robinson, who is present in the court room and who has been sworn as a witness, that he is president of The Washington Water Power Company, was such president on December 1, 1939, and has been at all times since; that on December 31, 1939, the Washington Water Power Company had book assets of \$76,235,798.39; that it had a surplus of \$4,775,246.79; that it had a bonded indebtedness of \$22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold \$22,000,000 of first mortgage bonds bearing three and a half percent interest.

Mr. Keith: Objected to on the general ground and on the special ground that the financial standing of the company at the time the declaration was taken would have no tendency to establish the fair market value of the property that is being [179] condemned.

The Court: Objection sustained on the general ground and exception allowed; objection overruled on the special ground.

Offer of Proof No. 79

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that The Washington Water Power Company is a public

utility company organized and existing under the laws of the State of Washington; that the company has total book assets of \$76,235,798.39 as of December 31, 1939; that it had a surplus of \$4,775,246.79; that it had a bonded indebtedness of \$22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold \$22,000,000 of first mortgage bonds bearing three percent interest; that as of December 9, 1939, The Washington Water Power Company was engaged in the production and distribution and sale of electric energy in the territory of eastern Washington and northern Idaho; that the property of Kettle Falls was held by the company as part of its total electrical system for use and development as a hydro-electric project as soon as the needs and demands of the company required its construction.

Mr. Keith: Objected to on the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 80

Mr. Paine:

Comes now the defendant, The Washington Water Power Company and offers to prove by the official records and reports of the Federal Power Commission: [180]

That the Federal Power Commission has granted many licenses for the development of hydro-electric power plants upon navigable streams; that among the principal ones so granted are the following:

Henry Ford & Son (Inc.), Hudson River

Alabama Power Co., Coosa River

South Carolina Pub. Ser. Authority, Santee and Cooper Rivers

Louisville Gas & Electric Co., Ohio River

Minnesota Power & Light Co., Mississippi River

Alabama Power Co., Tallapoosa River

Ford Motor Company, Mississippi River

Susquehanna Power Co. & Philadelphia Electric Co., Susquehanna River

Lexington Water Power Co., Saluda River

Puget Sound Power & Light, Columbia River

Safe Harbor Water Power Co., Susquehanna River.

Mr. Keith: Objected to on the general ground.

The Court: Sustain the objection and exception allowed.

Offer of Proof No. 81

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness J. P. Graves, who is present in the court room and who has been sworn as a witness, that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of de-

veloping said site, and that such reasonable probability [181] of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural and other purposes.

Mr. Keith: Objected to on the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 82

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness A. T. Larned, who is present in the court room and who has been sworn as a witness, that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural and other purposes.

Mr. Keith: Objected to upon the same general ground.

The Court: Objection sustained and exception allowed.

~ Offer of Proof No. 83

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness M. O. Leighton, who is present in the court room and who has been sworn as a witness, that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in [182] all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural and other purposes.

Mr. Keith: Objected to upon the same general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 84

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the

knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural purposes.

Mr. Keith: Objected to upon the same general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 85

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness O. B. Shay, who is present in the court room and who has been sworn as a witness, that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge [183] which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of

said property over and above its value for agricultural purposes.

Mr. Keith: The objection is made upon the same general ground and on the special ground that the witness is not competent to testify.

The Court: Objection sustained on the general ground and exception allowed; objection overruled on the special ground.

(Defendant's Exhibit No. 3 for identification marked)

Offer of Proof No. 86

Mr. Paine:

At this time the defendant, The Washington Water Power Company offers as its Offer of Proof No. 86 a document consisting of a photostatic copy of letter from O. C. Merrill, Executive Secretary of the Federal Power Commission, addressed to Mr. D. L. Huntington, President, The Washington Water Power Company, Spokane, Washington, dated January 4, 1922, which document the defendant requests the record to show was removed by the Clerk of the court from the envelope containing correspondence between the company and the Federal Power Commission heretofore sealed by the Clerk and deposited in the records and files in this case in accordance with the terms of the stipulation heretofore made between the parties and part of the record in this case, and labeled as Defend-

ant's Identification No. 3. I don't believe it is probably necessary to read it into the record.

Mr. Keith: The offer is objected to upon the general ground. [184]

The Court: Objection sustained and exception allowed.

Offer of Proof No. 87

Mr. Paine:

Comes now the defendant, The Washington Water Power Company, and as its Offer of Proof No. 87 offers to introduce in evidence a photostatic copy of a letter from O. C. Merrill, Executive Secretary, Federal Power Commission, addressed to Mr. D. L. Huntington, President, The Washington Water Power Company, Spokane, Washington, dated February 15, 1923, which letter we request the record to show was withdrawn from the envelope containing the correspondence between the company and the Federal Power Commission heretofore sealed by the Clerk and deposited in the records and files of this case in accordance with the terms of the stipulation heretofore made between the parties and part of the record of this case, labeled as Defendant's Identification No. 4.

Mr. Keith: The offer of proof is objected to upon the general grounds.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 88

Mr. Paine:

At this time the defendant, The Washington Water Power Company offers as its Offer of Proof No. 88, a document consisting of a photostatic copy of application for a permit to appropriate the public waters of the State of Washington and withdrawn from the envelope containing the correspondence between The Washington Water Power Company and the State Hydraulic Engineer heretofore sealed by the Clerk and deposited in the records and files of this case in accordance with the terms of the stipulation heretofore made between the parties and part of [185] the record in this case, and labeled as Defendant's Identification No. 5.

Mr. Keith: The offer is objected to on the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 89

Mr. Paine:

At this time the defendant, The Washington Water Power Company offers as its Offer of Proof No. 89 a document consisting of a photostatic copy of application for a permit to construct a reservoir and to store for beneficial use the unappropriated waters of the State of Washington withdrawn from the envelope containing the correspondence between The Washington Water Power Company and the

State Hydraulic Engineer, and labeled as Defendant's Exhibit for Identification No. 6.

Mr. Keith: The offer is objected to upon the general ground.

The Court: Objection sustained and exception allowed.

Offer of Proof No. 90

Mr. Paine:

At this time the defendant, The Washington Water Power Company, offers as its Offer of Proof No. 90, document consisting of a photostatic copy of a letter from Chas. J. Bartholet, Supervisor of Hydraulics of the State of Washington, dated July 17, 1934, which document the defendant requests the record to show was removed by the Clerk of the court from the envelope containing correspondence between The Washington Water Power Company and the State Hydraulic Engineer, and labeled as Defendant's Identification No. 7.

Mr. Keith: The offer is objected to upon the general [186] ground.

The Court: Objection sustained and exception allowed.

Mr. Paine: The purpose of the foregoing offers of proof, which were made at the time and in the manner suggested by Your Honor, is to show that the lands here involved had a value on December 9, 1939, for power site purposes by reason of their special adaptability for use as abutments for dams

in connection with the proposed Kettle Falls hydro-electric development and for the purpose of showing that such power site value, combined with the reasonable probability of a license being granted by the Federal Power Commission for the development of such hydro-electric development, had an effect upon the market value of the lands here involved, and to show that there was a reasonable probability at the time of the taking of these lands by the Government that these lands would have been devoted to power site purposes at that time or within the reasonably near future thereafter. It is nothing, of course, to object to, but as an explanation, so you will understand we presented our reasons to the Court. I believe that concludes our offers.

Mr. Keith: Now, I am certain that the record is clear on this, but I want to be doubly certain, and that is, that it was agreed between counsel on the two sides that it would not be necessary for the Government, in objecting to the various offers of proof made, to state specifically its objection on what has been referred to as the "general grounds." The general grounds were those argued before Your Honor prior to the making of the offers of proof.

The Court: The record may show that as far as the Court is concerned it considers the general ground the matters [187] raised in the argument of Mr. Stontemyer and Mr. Keith and discussed for three days before the Court, and that the Court is fully cognizant of all of the arguments for and against the admission of this evidence and that it

would simply be a waste of everybody's time to have the repetition upon each offer of proof of the detailed statements of the attorneys.

Mr. Keith: That view is agreed to by The Washington Water Power Company, is it?

Mr. Paine: Yes. As I understand, there is no objection taken to the form of the offers of proof in regard to the witnesses sitting in the box and so forth.

The Court: I understand that was stipulated to yesterday.

Mr. Paine: Let the record show that the defendant rests.

(Defendant rests.)

Mr. Keith: Let the record show that at this time the United States, the plaintiff-petitioner in the above entitled case, now moves the Court that it direct the jury to return a verdict in favor of the defendant, The Washington Water Power Company finding that the value of the property is the sum of \$7,950.35, and that the Court also direct the jury to return a verdict finding the value of the Clara (Lillian C.) Hummel tract to be the sum of \$241.35.

Mr. Herman: To which motion we object on behalf of The Washington Water Power Company and other defendants we represent.

The Court: The motion is granted and exception allowed on the part of The Washington Water Power Company and other defendants.

(The Clerk confers with the Court.) [188]

The Court: The Clerk calls my attention to this last paragraph of the stipulation concerning the Hummel tract: "That a judgment shall be entered herein directing the payment of Two hundred forty-one and 35/100 Dollars (\$241.35) to the defendant Lillian C. Hummel, a spinster, less unpaid taxes, if any." That being true, a verdict on the Hummel tract would not be necessary.

Mr. Keith: It seems to me it makes no substantial difference. [189]

The Court: Now, will the attorneys for the Government agree that in view of the fact that the attorneys for Ferry County and Stevens County were told last week that the length of the trial was not definitely determined and that they didn't need to come back until they had notice of it, and in view of the fact that the Court has already ruled in favor of the counties as against the Government on the question of taxes, that the Government will raise no objection to the fact that the Court instruct the jury to return verdicts in favor of the respective counties in the amount that the record shows, on the basis that no motion was made by the attorneys for a directed verdict, it being understood that by not raising that objection that the Government is not waiving any objection that they have to the fact that a directed verdict is ordered or that it may

not object to the fact that the Court rules that the amounts to be paid to the counties should be paid by the Government over and above the amount awarded to The Washington Water Power Company? All that I am asking is that you agree not to object on the ground that the attorneys are not here and not making the motion formally.

Mr. Keith: Yes, we will agree to that, Your Honor.

Mr. Stoutemyer: Yes.

The Court: Now, yesterday afternoon the county assessor of Stevens County was here and I asked him to get together with Mr. LaFramboise and you gentlemen. I understood that you had agreed upon the way the verdict to the counties, the amount, should be set up. Is that correct?

Mr. Stoutemyer: I have talked with one of them and I find this to be true: That the theory of the county auditors works out practically the same as our theory, though it is a [190] different theory. The amount amounted to practically the same.

(Discussion between counsel for the Government and the Court regarding form of verdict in favor of the counties omitted.)

The Court: I am holding that you have to pay the interest on the basis of the Washington statute which says a person who buys a piece of property before the first of February has to pay the taxes the next year. It is not on the question of the value of the property. It is just that the Washington statute holds that and the Supreme Court in the Alabama case said that we should follow the state

statute. If they followed about three-quarters of our state statute, it seems logical that we ought to follow the rest of the state statute, and I am holding that. Well, what is the way the verdict will read?

Mr. Stoutemyer: Well, under your ruling I assume the verdict to the county should be for the amount of the taxes, without interest, as they were at the date of the taking, and then when the judgment is prepared you will add six percent interest on that amount from the date of taking to the date of judgment.

The Court: All right.

Mr. Keith: There is one additional consideration in regard to these taxes that I think should be called to the Court's attention. I don't think it is controlling at all, but I talked to both Mr. Noble and Mr. Grinstead over long distance this morning. Of course, under the state statute interest on the taxes had not begun to run until a long time subsequent to the date of taking. They have authorized me to say to the Court that so far as both of them were concerned they did not feel [191] that the county had any claim for interest other than from June 1, 1940, that being the date upon which if the first half of the taxes were not paid, interest would run on the whole. I wanted to make that known to the Court because I feel that should be done. That will be taken care of in the judgment and not the verdict.

(Whereupon, a short recess was taken, after which the jury was brought in and instructed by the Court as follows:)

The Court: Members of the jury, as I told you yesterday, the disposition which was made of the testimony which the defendant offered and concerning which I ruled that it was not to be admitted, leaves nothing in this case as a matter of fact for the jury to decide. The parties have stipulated, as you remember, in the stipulation which I read to you at the outset of this trial that if I should rule that The Washington Water Power Company was not entitled to introduce testimony as to the value of this property for power site purposes, that it was agreed that the value of the property for agricultural and grazing purposes was \$7,950.35, and I explained to you when you first started your service as jurors the division of functions between the Court and the jury is that it is the function of the jury to decide questions of fact and the function of the Court to decide questions of law. The parties having stipulated as to the facts which would be the ultimate fact for you to decide in this case, the amount to be awarded to the defendant, The Washington Water Power Company, since they have stipulated as to that amount being \$7,950.35, it leaves no question of fact for you to decide and I have granted a motion of the [192] plaintiff that I direct the jury to return a verdict in favor of the defendant, The Washington Water Power Company, in the sum of \$7,950.35, and I now direct you to return that verdict and appoint Mr. Clausen as foreman of the jury to sign that verdict as between the plaintiff and the defendant The Washington

Water Power Company, and will allow an exception to The Washington Water Power Company for the ruling.

You will also remember that we had testimony from two of the counties, Stevens County and Ferry County. The testimony was as to the amount of taxes which were due upon this property taken and known as the 1940 taxes. After the testimony was submitted we had a legal argument here as to the right of the counties to collect the taxes and on the question as to who should pay those taxes, whether they should be paid by the Government or by the defendant, The Washington Water Power Company. That was purely a question of law, and upon that question I decided that the counties were entitled to collect for the taxes for the year 1940, and furthermore decided that the Government would be compelled to pay for those taxes, and there is no question as to the amount, or no dispute as to the amount, and since your function would be to determine the amount and they have agreed upon the amount, I am therefore instructing the jury to return a verdict in favor of the defendant Stevens County in the agreed sum of \$1,950.76, and for the defendant Ferry County in the agreed sum of \$1,033.20, and I will allow the plaintiff an exception to the ruling and to the direction of the verdict in those amounts in each instance, and I will ask Mr. Clausen to sign the three verdicts on behalf of the jury.

Mr. Keith: If Your Honor please, may we have

an exception [193] to the failure to give our requested instructions on the tax matter?

The Court: I didn't know that you had requested instructions, but if you have you may have an exception on the failure to give them, yes.

Mr. Keith: There are three which are given which are not in harmony with Your Honor's views.

The Court: All right. I will decline to give the instructions and allow you an exception. Having done that, I will also decline to give the instructions offered by the defendant, The Washington Water Power Company, and allow an exception, and the record may show in each instance that the Court has specifically ruled that there was no necessity for separate exceptions for the failure to give each separate instruction because the decision which I made upon the question of the admissibility of evidence, so far as The Washington Water Power Company is concerned, made it unnecessary for them to take separate exceptions. It would not make any difference what was in the instructions. I couldn't give the jury any instructions when ruling as I did, and the same exception with reference to the exceptions with reference to the counties. The Clerk will read the verdicts.

(Whereupon, the verdicts were read by the Clerk.)

The Court: The verdicts will be received and filed.

Mr. Herman: If Your Honor please, we have discussed something with Mr. Keith about a motion

for a new trial and the disposition of it and I move at this time that the Court withhold the making and entering of any judgment until after the motion for a new trial is disposed of. The motion for a new trial will [194] be made within the next two days. I ask the Court to withhold entering the judgment. [195]

REPORTER'S CERTIFICATE

State of Washington,
County of Spokane—ss.

I, Geo. J. Stewart, do hereby certify:

That I am the Court Reporter who reported the proceedings had and testimony taken in the above entitled cause; that the above and foregoing Transcript of Evidence and Proceedings is a full, true, correct and complete transcription of the same.

GEO. J. STEWART

Court Reporter

[Endorsed]: Filed March 30, 1942. [196]

PLAINTIFF'S IDENTIFICATION "A"

The following is an extract from the minutes of a meeting of the Federal Power Commission held June 23, 1936:

ORDER DENYING APPLICATION
FOR LICENSE

(Project No. 229)

It appearing to the Commission:

(1) That on July 26, 1922, a preliminary permit was issued to The Washington Water Power Company for three years, for the project known as project No. 229 at Kettle Falls on the Columbia River in Ferry and Stevens counties, Washington; and that on July 21, 1925, pursuant to said preliminary permit, an application was filed by The Washington Water Power Company for a license for the construction of said proposed project consisting of a dam, reservoir, power plant and appurtenant works;

(2) That said application for license was referred to the office of the Chief of Engineers of the War Department on July 25, 1925 for investigation and report, which report was deferred pending the applicant's completion of (a) required investigations of the feasibility of raising the dam and normal pool level of said proposed project about 40 feet so as to utilize the entire available head to the International boundary between Canada and the United States, and (b) further explora-

tions of the dam site and reports thereon by a geologist and board of consulting engineers; and which report was also deferred pending a study by the War Department of all phases of the relation of said proposed project to the comprehensive development of the said Columbia River;

(3) That investigations were undertaken under the direction of the Secretary of War and supervision of the Chief of Engineers pursuant to Section 1 of the River and Harbor Act, approved January 21, 1927, of the upper Columbia River, as authorized by Congress in accordance with House Document No. 308, Sixty-ninth Congress, First Session, dated April 13, 1926, and the Chief of Engineers of the War Department under letter dated March 29, 1932, submitted to the Secretary of War a report containing a general plan for the improvement of the Columbia River and minor tributaries, and proposed in said report a dam on Columbia River at the Grand Coulee site, designed to raise the water surface about 350 feet above low water to a pool elevation of 1,287.6 feet, thus backing water to a point near the International boundary and providing for the development of a large amount of electric power and for the irrigation of the so-called Columbia basin project by pumping;

(4) That by letters to the Commission, dated March 12, 1931, and March 27, 1931, the Commissioner of Reclamation recommended that the Commission dismiss all applications contemplating developments on the Columbia River between Grand

Coulee and the International boundary line as being an interference with the said proposed Columbia Basin project, and in order to safeguard the possibility of building a high dam at Grand Coulee as being conducive to the public interest; [205]

(5) That by letter to the Commission, dated May 5, 1932, the Chief of Engineers of the War Department recommended to the Commission that the application of said The Washington Water Power Company be rejected on account of interference with the said proposed Columbia Basin project, and as not being in accordance with the requirements of Section 10(a) of the Federal Water Power Act, in that the development as proposed was not the best adapted to a comprehensive scheme of improvement, utilization for the purpose of navigation, and of other beneficial public uses of water power resources;

(6) That in view of said report under date of March 29, 1932 from the Chief of Engineers of the War Department, and in view of said recommendations from the Chief of Engineers and the Commissioner of Reclamation, the Commission on February 16, 1933, ordered the applicant to show cause by May 19, 1933, why its application for said license should not be rejected; that in response to said order the applicant submitted certain information and representations:

(7) That on August 30, 1933, the Commission, in an order authorizing the issuance of a preliminary permit to the Columbia Basin Commission for the

development of the Grand Coulee site on the Columbia River designated as project No. 1242, found that said development would conflict with project No. 229, but that said project No. 1242 was best adapted to a comprehensive scheme of improvement and utilization of the water resources of the region for navigation, water-power development, irrigation, flood control, and other beneficial public uses, and was desirable and justified in the public interest for the purpose of improving and developing the Columbia River for the use and benefit of interstate and foreign commerce.

(8) That on July 13, 1934, the Secretary of the Interior approved an award of contract for the construction of the Grand Coulee dam project as a Federal project, at the Grand Coulee site, located on the Columbia River, and on August 2, 1935, the Congress under Section 2 of the Rivers and Harbors Act of August 2, 1935 (Public No. 409, 74th Congress), authorized and adopted the Grand Coulee dam project, validated and ratified all contracts executed in connection therewith, and authorized the construction, operation, and maintenance of dams, structures, canals, and incidental works necessary to the project, and the making of all necessary contracts in connection therewith;

(9) That on April 21, 1936, the Commission adopted an order for a hearing on the said application and all matters pertinent thereto, to be held on May 25, 1936; that, after appropriate notice thereof, such hearing was held on May 25, 1936, at

which hearing the applicant was heard in support of its application, and others appearing were heard in protest and objection to the granting of the said application.

Now, therefore, the Commission having considered the application, the protests, the evidence and representations at the hearing, and all matters of record pertaining to the application including the reports and recommendations from the Chief of Engineers of the War Department and the Commissioner of Reclamation, finds: [206]

(1) That the development of the water resources of the Columbia River for public purposes has been undertaken at Grand Coulee site by the United States, and that the application for project No. 229 affects and is in conflict with such development;

(2) That the plans for the proposed project No. 229 are not the best adapted to a comprehensive plan for the improvement and utilization of the water resources of the region for irrigation, flood control, navigation, water-power development, and other beneficial public uses;

(3) That, in the light of the subsequent events and matters hereinabove enumerated, the applicant, by the information and representations submitted by it in response to the Commission's said order of February 16, 1933, and by its testimony at said hearing held on May 25, 1936, has failed to show good and sufficient cause why the said application should not be rejected;

(4) That the granting of a license for said

project No. 229 would not be in the public interest.

Therefore, it is ordered:

That the application of The Washington Water Power Company for license for project No. 229 be and the same is hereby denied.

L. M. F.

Acting Secretary [207]

DEFENDANT'S IDENTIFICATION "1"

Inclosure 9910 from Federal Power Commission

Federal Power Commission

Washington, D. C.

Preliminary Permit

Project No. 229—Washington

The Washington Water Power Company [208]

I, O. C. Merrill, Executive Secretary of the Federal Power Commission, do hereby certify that the following is a true and correct copy from the record of the proceedings of the Commission in my custody of that portion of the minutes of the thirty-fourth meeting of the Commission, held on the 23rd day of June, 1922, which refers to the application of the Washington Water Power Company, of Spokane, Washington (Project No. 229).

"In the matter of the application of the Washington Water Power Company, of Spokane, Washington (Project No. 229), for a preliminary permit and license for a power

project on the Columbia River, a navigable waterway of the United States, and on lands of the United States in Ferry and Stevens Counties, Washington, involving the construction of a dam and power house at Kettle Falls in the Columbia River: said company having submitted satisfactory evidence of its right to perform within said State of Washington the acts necessary for the purposes of such permit and of its ability to finance the preliminary work and the proposed project; notice of said application having been given and published as required by Section 4 of the Federal Water Power Act, full opportunity having been given for all interested parties to be heard and no application for said project or in conflict therewith having been filed by any State or municipality; and it appearing that said project can be developed into and adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development and of other beneficial public uses; it was voted that preliminary permit be issued for a period of three (3) years, subject to the provisions of said Act, to the rules and regulations of the Commission pursuant thereto, and to the following special conditions:

“(1) The Permittee to provide in its plans for the construction by the United States at some future date of locks and appurtenant navigation facilities at the dam, the general dimen-

sions of such locks to be in accordance with instructions from the United States District Engineer at Seattle, Washington.

“(2) The Permittee so to design his project works as to leave free and open any existing portage at Kettle Falls.

“(3) License if issued to contain a provision to the effect that if and when the United States shall decide to provide navigation facilities at the Kettle Falls dam, the licensee shall convey to the United States such of its lands and its rights of way and such right of passage through its dam or other structures as may be required for navigation facilities constructed by the United States.”

Witness my hand and seal of the Federal Power Commission at Washington, D. C., this 14th day of July, 1922.

O. C. MERRILL

Executive Secretary. [209]

On motion of Mr. L. M. Davenport, seconded by Mr. Porter, it was—

Resolved, that the proper officers of this company be, and they hereby are, authorized to execute and deliver to the Federal Power Commission an acceptance of a Preliminary Permit of said Federal Power Commission for the Kettle Falls Project of this company, in the form and language submitted to this Committee, and that a copy of the Preliminary Permit, and

of such acceptance, be attached to the minutes of this meeting of the Executive Committee and shall be a part thereof.

The resolution was unanimously carried.

I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted at a meeting of the Executive Committee of The Washington Water Power Company held at the office of the company, Spokane, Washington, on the 19th day of July, 1922, there being a quorum present.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of the Company this 21st day of July, 1922.

V. G. SHINKLE

Secretary of The Washington
Water Power Company.

“Between the meetings of the Board of Trustees the Executive committee shall have all the powers and duties of the Board of Trustees, excepting the powers and duties conferred by these by-laws upon the Finance Committee.”

I hereby certify that the foregoing is a full, true and correct copy of a portion of Article 5 of the by-laws of The Washington Water Power Company, and that the same is now in full force and effect.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Company, this 21st day of July, 1922.

V. G. SHINKLE

Secretary of The Washington
Water Power Company. [210]

The Federal Power Commission

Preliminary Permit

Project No. 229—Washington

The Washington Water Power Company

Whereas, by Act of Congress, approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "the Act," the Federal Power Commission, hereinafter called "the Commission," is authorized and empowered, inter alia, to issue preliminary permits for the purpose of enabling applicants for a license under the Act to secure the data and to perform the acts required of such applicants by Section 9 of the Act: and

Whereas, the Washington Water Power Company hereinafter called "the Permittee," a public utility corporation organized and existing under the laws of the State of Washington and having its office and principal place of business in the City of Spokane, in said State, is an applicant for a license under the Act, and, in order to maintain priority of application therefor while securing the data and performing the acts aforesaid and to comply with the

rules and regulations of the Commission with respect to applications for license, filed in due form with the Commission on the thirtieth day of June, 1921, an application for a preliminary permit for a proposed power project, designated as Project No. 229 on the records of the Commission, located in the vicinity of Marcus, in the Counties of Ferry and Stevens, State of Washington, and involving certain lands of the United States, all as hereinafter described; and

Whereas, the Permittee has submitted satisfactory evidence of its incorporation of its right to perform within said State of Washington the acts necessary for the purposes of this permit, and of its ability to finance the preliminary work and the proposed project; and

Whereas, notice of said application has been given and published by the Commission as required by Section 4 of the Act; full opportunity has been given all interested parties to be heard; and no application for said proposed [211] project, or in conflict therewith, has been filed by any State or municipality; and

Whereas, it appears that said proposed project, as hereinafter described can be developed into and adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development and of other beneficial public uses; and that neither the permit nor the license applied for will interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired; and

Whereas, the Permittee on the 19th day of July, 1922, pursuant to an authorization of its Executive Committee, hereto attached, accepted in writing the terms and conditions of this permit.

Now, Therefore, the Permittee is hereby granted a preliminary permit for the sole purpose of maintaining priority of application for a license under the terms of the Act while making examinations and surveys, preparing maps, plans, specifications, and estimates, and making financial arrangements; said permit being subject to all the terms and conditions of the Act, to the rules and regulations of the Commission pursuant thereto, which said rules and regulations are hereto attached and made a part hereof, and to the following express conditions, to wit:

Article 1. The priority granted hereunder shall be for a period of three (3) years from the date of issuance hereof, and for a proposed project described as follows:

A dam and power house at Kettle Falls in Columbia River, all as located and described by certain maps and data filed with and made a part of said application for preliminary permit.

Article 2. The Permittee shall on or before the first day of April, 1925, file with the Executive Secretary of the Commission at Washington, District of Columbia, or with such other officer or agent of the Commission, or at such place, as may be designated by the Commission, and in the manner prescribed by said rules and regulations, an application for a license for said proposed project and for the

use and occupancy of such lands or other property of the United States as may be required in the construction, maintenance or operation thereof. [212]

Article 3. The Permittee shall make such engineering and other investigations, secure such data and perform such acts as will enable it to submit to the Commission on or before the date named in Article 2 hereof, such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project; and shall supply for the use of the Commission correct copies of engineering reports and of any other information secured in connection with such investigations when and as they are submitted to the Permittee. In carrying out the requirements of this article, the Permittee shall—

A. Install as soon as practicable and thereafter maintain a standard stream-gage and stream-gaging station at such point as may be necessary to determine the stage and available flow of Columbia River shall provide for periodic readings of such gage and for the adequate rating of the said stream-gaging station. The exact location, design and time of installation of gages and stations, the ratings of said stations, and the determination of the flow thereat, shall be made in cooperation with the United States Geological Survey and under the supervision of its District Engineer having charge of stream-gaging operations in the region of said project; and the Permittee shall

reimburse the said United States Geological Survey for expenses incurred in such cooperation and supervision, or for such part thereof as said District Engineer may deem equitable in the circumstances. The Permittee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, shall make return of such records at the time of filing application for license as aforesaid, and at such other times as the Commission may require, and in such form as the Commission may prescribe.

B. Sink such test pits or make such borings or other foundation explorations as will make available sufficient information relating to character of foundations for the said dam and power house to permit of the designing of such dam and power house in [213] accordance with good engineering practice and the checking of their safety, adequacy, and desirability in the development of the resources involved.

C. Provide in its plans for the construction by the United States at some future date of locks and appurtenant navigation facilities at the dam, the general dimensions of such lock to be in accordance with instructions from the United States District Engineer at Seattle, Washington.

D. So design his project works as to leave free and open any existing portage at Kettle Falls.

Article 4. License will be issued for said proposed project only if it appears that the scheme of development proposed in said application for license will be best adapted to the improvement and utilization of the site for purposes of navigation, of water-power development and of other beneficial public uses. In reaching decision thereon, the Commission will consider:

A. Whether the maps, plans, and specifications are such:

(1) That full, practicable utilization will be made of the water, storage possibilities, and the head at the site to be developed.

(2) That the structures will be safe and in accordance with good engineering practice.

(3) That all unnecessary energy losses, whether in hydraulic works or in mechanical or electrical equipment, will be avoided.

B. Whether in relation to existing or probable future projects upon the same or adjacent streams, the fullest practicable utilization of the water, storage possibilities, and head available will be made possible.

C. Whether said project will be in general accord with the most beneficial utilization of the water for navigation, water power, irrigation, or other beneficial public uses, and for aiding flood control, reclamation, and similar developments. [214]

D. Whether proper provision is made for present or future electrical interconnection with

other projects or systems in order to take advantage of diversity of stream flow and of power demands.

E. Whether the use to which the power will be devoted is, in general, in accord with the needs of the community and of the public welfare.

F. Whether the applicant is financially able to carry out the development.

Article 5. The priority granted hereunder may be lost if the Permittee fails to fulfill the requirements of this permit, if the permit is cancelled by order of the Commission, or if in the course of consideration by the Commission of said application for license, the Permittee shall not on or before the expiration of the period hereof, or such later date as may be fixed by the Commission:

A. File data required by the Commission in addition to that contained in or furnished with said application; or

B. Present satisfactory evidence of ability to carry out the plan as set forth in said application, or as required to be modified by the Commission; or

C. Accept the conditions of the proposed license; or

D. Modify its plans as may be required by the Commission if the project adopted as disclosed in said plans is not such as in the judgment of the Commission, based upon the con-

siderations set forth in Article 4 hereof, will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses.

Article 6. The Permittee shall keep accurate and dependable records of all expenditures made for the purposes authorize herein; and in the event that a license is issued for said proposed project covered in whole or in part by this permit, any and all items properly includible in the actual legitimate [215] cost of said project, representing expenditures made before the date of the license, shall be supported by proper vouchers or other records, the same as would have been required of a licensee had no preliminary permit been issued; and any such vouchers or records, or certified copies thereof, in support of any item properly includible in the cost of said project shall become a part of the records of said project and shall be kept and retained by the Permittee in the manner required by the Commission. A report of all such expenditures, in such detail as the Commission may require, shall be submitted promptly when called for by the Commission.

Article 7. If license is issued for said proposed project it shall be subject to the rules and regulations of the Commission in force at the date of issuance hereof; shall, subject to the provisions of Sections 13, 16, and 26 of the Act and of the last proviso of Section 14 of the Act, be for a period

of fifty (50) years, and shall provide that the licensee shall convey to the United States such of its lands and its rights of way and such right of passage through its dam or other structures as may be required for navigation facilities constructed by the United States.

Article 8. This permit confers no authority upon the Permittee to occupy or use lands or other property of the United States for purposes of construction unless specific permission is given by the Commission for such occupancy or use; and neither the granting of such authority nor the performance of construction work whether with or without such authority shall be deemed to have created any equities or to have established any rights with respect to issuance of license, beyond what would have been created or established had such authority not been given or such work not been performed.

Article 9. This permit is not transferable and may be cancelled by order of the Commission upon failure of the Permittee in good faith to begin or diligently to prosecute the investigations contemplated herein, or to comply with any other conditions hereof.

In Witness Whereof, the Federal Power Commission has caused its name and seal to be hereto signed and affixed by O. C. Merrill, its Executive Secretary, this twenty-sixth day of July, 1922.

FEDERAL POWER COMMISSION

By O. C. MERRILL

Executive Secretary [216]

In testimony of acceptance of all the terms and conditions of the Federal Water Power Act of June 10, 1920, and of the further conditions imposed in the foregoing Preliminary Permit, the Permittee, this 21st day of July, 1922, has caused its name and corporate seal to be hereto signed and affixed by D. L. Huntington, its President, pursuant to a resolution of its Executive Committee, passed on the 19th day of July, 1922, a certified copy of the record thereof being hereto attached.

THE WASHINGTON WATER
POWER COMPANY,

By D. L. HUNTINGTON
President.

Attest:

V. G. SHINKLE
Secretary. [217]

Federal Power Commission
Rules and Regulations

As Amended by Order No. 11 of June 6, 1921

Governing the Administration of
the Federal Water Power Act

With Copies of the Act, of Amendment Thereto,
And of Orders Nos. 1 to 11, Inclusive

First Revised Issue

Effective June 6, 1921

Washington
Government Printing Office
1921 [218]

DEFENDANT'S IDENTIFICATION "3"

Federal Power Commission
Washington

Secretary of War, Chairman

Secretary of the Interior

Secretary of Agriculture

O. C. Merrill, Executive Secretary

Address Reply to

Executive Secretary

and Refer to

E

January 4, 1922

Projects, Wash. (#229)

Washington Water Power Co.

Mr. D. L. Huntington,

President, The Washington Water Power Co.,
Spokane, Washington.

Dear Sir:

Replying to your letter of December 26, the Commission should be able to act on an application for a license for your Kettle Falls project without much delay, assuming that the plans have been prepared in a satisfactory manner. The project was outlined pretty thoroughly in your application for a preliminary permit so that this office has a fairly clear understanding of what you are proposing to do and how you propose to do it. The application will not have to be advertised. A supplemental report from Col. Schulz will be desired, upon receipt of

which a license will be drafted and submitted to the Commission at its first meeting thereafter. The Commission meets at least once a month and the question of drafting a license where no complications exist, as appears to be the case with this project, is a matter of only a few days. To save time I suggest that you file two of the three copies of your application for a license direct with Col. Schulz, with the request that he submit his report on the application as early as practicable. Inasmuch as Col. Schulz has already reported on the application for a preliminary permit, only a supplemental report covering features not heretofore discussed need be prepared. I believe that the necessary procedure from the time the application is filed until the license is granted can be carried out in one to two months, depending on circumstances.

Very truly yours,

O. C. MERRILL

Executive Secretary.

Noted VHG

Received

Jan 8 1923

Answered Jany 8-23

By dlh [219]

DEFENDANT'S IDENTIFICATION "4"

Federal Power Commission
Washington

Secretary of War, Chairman

Secretary of the Interior

Secretary of Agriculture

O. C. Merrill, Executive Secretary

Address Reply to

Executive Secretary

and Refer to

E

Projects, Washington, (#229)

Washington Water Power Co.

February 15, 1923.

Mr. D. L. Huntington,

President, The Washington Water Power Co.,

Spokane, Washington.

Dear Sir:

Replying to your letter of February 10 you are informed that you are correct in assuming that the Commission will issue a license for your project prior to your obtaining title or flowage rights over lands to be affected by the proposed development.

In regard to the matter of obtaining the right to occupy or overflow Indian lands you are informed that this Commission can grant such authority for tribal Indian lands. Authority to use allotted Indian lands must be obtained from the Commissioner of Indian Affairs, Department of the Interior, ex-

cept that those allotted Indian lands owned by Indians possessing a certificate of competency may be procured or occupied by negotiations direct with the Indian as is the case with ordinary private property.

I am pleased to hear of the progress that you are making with your plans for developing Kettle Falls.

Very truly yours,

O. C. MERRILL

Executive Secretary

#52 Deft Id "4"

Received Feb 21 1923

Answered By [220]

DEFENDANT'S IDENTIFICATION "5"

Received Jan. 25 1922 Division of Hydraulics

Duplicate

Form 10

*Permit No.....

Application for a Permit to Appropriate the Public
Waters of the State of Washington

I, Washington Water Power Company (Cancelled
3/3/37 A. A. L.) of Spokane, County of Spokane,
State of Washington, do hereby make application

* When storage works are contemplated a storage permit must be filed in addition to the above. These forms can be secured, together with instructions, by addressing the State Hydraulic Engineer, Olympia, Washington. [221]

for a permit to appropriate the following described public waters of the State of Washington subject to existing rights:

If the applicant is a corporation, give date and place of incorporation—March 13, 1899—Washington.

1. The source of the proposed appropriation is Columbia River tributary of.....

2. The amount of water which the applicant intends to apply to beneficial use is 50000 cubic feet per second.

3. The use to which the water is to be applied is Power Development for Mining, Manufacturing, Domestic, Railway, Municipal Waterworks Pumping, Industrial, Irrigation Pumping, etc.

4. Time during which water will be required each year—Continuously—Dependent on Requirements of Company customers.

5. The approximate point of diversion is located.—Sec. 2 and Sec. 11, Twp. 36 N, R. 37 E. W. M. being within the of Sec., Tp. R. W.M., in the counties of Ferry and Stevens.

6. The Minor channel for headrace, to be miles in length, terminating in the of Sec. Tp., R. W.M., the proposed location being shown throughout on the accompanying map.

7. The name of the ditch, canal or other works is Kettle Falls Power Project.

8. Estimated cost of development necessary to fully utilize the appropriation herein asked for Preliminary cost estimate Fifteen to Twenty Million Dollars.

Description of Works.

Diversion Works—

9. (a) Height of diversion dam feet;
length on top feet; length at bottom feet;
material to be used and character of construction

(b) description of headgate—

Canal System—

10. (a) Give approximate dimensions at each point of canal where materially changed in size, stating miles from headgate. At headgate: Width on top (at water line) feet; width on bottom feet; depth of water feet; grade feet fall per one thousand feet.

(b) At miles from headgate; Width on top (at water line) feet; width on bottom feet; depth of water feet; grade feet; depth of water feet; grade feet fall per one thousand feet.

Fill in the Following Information Where the Water Is Used for:

Irrigation—

11. The land to be irrigated has a total area of acres, described as follows:

Duty of Water—

Character of soil: Depth sandy volcanic ash loam clay etc.; Annual precipitation inches; precipitation during growing season inches; Depth of irrigation water required..... [222]

Power, Mining, Manufacturing, or Transportation
Purposes—

13. (a) Total amount of power to be developed
—Primary & Secondary—Approximately 300,000
H.P.

(b) Total fall to be utilized 75 feet.

(c) The nature of the works by means of which
the power is to be developed—Necessary dams,
headrace and power house equipment to be installed
for this purpose.

(d) Such works to be located in of Sec. 2
& 11 Tp. 36N, R. 37, E. W. M.

(e) To what stream is the water to be returned
—Columbia River.

(f) Locate point of return—Lot 2 Sec. 11 Tp
36N R. 37 E. W. M.

(g) The use to which power is to be applied is
(same as 3). Remarks—Please note application for
preliminary permit has been made to Federal
Power Commission under existing Federal Law.
Exhibit H attached.

Sheet #1 & 2 Map of Kettle Falls project show-
ing location of project works and project boundary
enclosing reservoir area.

Municipal Supply—

14. To supply the city of County, having
a present population of and an estimated
population of in 19.....

15. Estimated present requirement

16. Estimated future requirement

17. Construction work will begin on or before

18. Construction work will be completed on or before

Duplicate maps of the proposed ditch or other works, prepared in accordance with the rules of the State Hydraulic Engineer accompany this application.

WASHINGTON WATER
POWER COMPANY

By D. L. HUNTINGTON

President [223]

Signed in the presence of us as witnesses:

(1) M. W. Birkett, c/o W. W. P. Co., Spokane, Washington.

(2) V. H. Greisser, c/o W. W. P. Co., Spokane, Washington.

Remarks:.....

State of Washington,
County of Thurston—ss.

This is to certify that I have examined the foregoing application (Received) together with the accompanying maps and data, and return the same for correction or completion, as follows:

In order to retain its priority, this application must be returned to the State Hydraulic Engineer, with corrections, on or before, 19....

Witness my hand this day of 19....

.....
State Hydraulic Engineer. [224]

DEFENDANT'S IDENTIFICATION "6"

Received Jan. 25, 1922.

Division of Hydraulics.

Duplicate

Reservoir Permit No.

Application for a Permit to Construct a Reservoir
and to Store for Beneficial Use the Unappropriated
Waters of the State of Washington

I, Washington Water Power Company (Cancelled
3/3/37 A. A. L.) of Spokane, County of Spokane,
State of Washington, do hereby make application
for a permit to construct the following described
reservoir and to store the unappropriated waters
of the State of Washington subject to existing
rights.

If the applicant is a corporation, give date and
place of incorporation—March 13, 1889—Washington.

1. The name of the proposed reservoir is Kettle
Falls Power Project.

2. The name of the stream from which the reservoir
to be filled and the appropriation made is Columbia
River, tributary of

3. The amount of water to be stored is approximately
60,000 acre-feet between max. level and crest
of dam.

4. The use to be made of the impounded water
is Power and as more fully set forth in Appropriation
Permit No.

5. The location of the proposed reservoir will
be in Sec.—See Exhibit "H".

(a) State whether situated in channel of running stream and give character of material at outlet—Columbia River channel upstream from dam.

(b) If not in channel of running stream, state how it is to be filled. If through a feed canal, give name and dimensions

6. The impounding dam will be located in
Sec. 2 & 11, Tp. 36N, R. 37 E. W. M. It will be Max. 75 feet in height, having a length on top of 1102 feet; length on bottom 1102 feet; [225] width on top feet; slope of front of water side; slope on back; height of dam above water line when full feet.

7. The construction of dam, the material of which it is to be built, and method of protection from waves are as follows: Concrete.

8. The location of waste way with dimensions are as follows: Sec. 11, Twp. 36N, R. 37 E. W. M. Approx. 850' spillway.

9. The location of outlet from the proposed reservoir, with character of construction and dimensions, are as follows:

10. The area submerged by the proposed reservoir, when full, will be 5,000 acres, with a maximum depth of water of feet, and approximate mean depth of water feet.

11. The estimated cost of the proposed work is—
See Permit No.

12. Construction work will begin on or before

13. Construction work will be completed on or before

Duplicate maps of the proposed reservoir and storage works, prepared in accordance with the rules of the State Hydraulic Engineer accompany this application.

WASHINGTON WATER
POWER COMPANY

By D. L. HUNTINGTON
President

Signed in the presence of us as witnesses:

M. W. Birkett, c/o W. W. P. Co., Spokane,
Washington.

V. H. Greisser, c/o W. W. P. Co., Spokane,
Washington. [226]

DEFENDANT'S IDENTIFICATION "7"

State of Washington

Department of Conservation and Development

Division of Hydraulics

Olympia

E. F. Banker, Director

J. B. Fink, Assistant Director

C. J. Bartholet,

Supervisor of Hydraulics

July 17th, 1934.

Washington Water Power Company

Spokane, Washington

Attention: Benj. J. Lindsay, Asst. Right of Way
Agent

Gentlemen:

Further replying to your letter of June 22nd:

Please be advised that permits to appropriate and store waters of the Columbia River were issued to-

day to the Columbia Basin Commission for the development of the project at Grand Coulee.

However, applications 708 and 709 of the Washington Water Power Company for permits to appropriate and store water at Kettle Falls will be kept in good standing until steps are taken to construct the dam at Grand Coulee to the full height, or an elevation of 1300 ft. approximately, U. S. datum.

You may also be interested in learning that steps have been taken by the Secretary of the Interior to withdraw waters of the Columbia River from appropriation, as provided for in Chap. 88, Laws of 1905 and Sec. 27, Chap. 117, Laws of 1917.

Yours very truly,

CHAS. J. BARTHOLET

Supervisor of Hydraulics

CJB:GH [227]

[Title of District Court and Cause.]

PETITIONER'S PROPOSED INSTRUCTIONS
TO THE JURY

Instruction No. 1

You are instructed, that the tax liens on lands taken by the United States in eminent domain proceedings do not increase the value of the land which the plaintiff is required to pay therefor.

Instruction No. 2

You are instructed, that the total award or awards which should be made against the United States for the lands condemned in this action (other than Tract No. 2, the Hummel tract) should be the value of the land, that is, the sum of \$7,950.35.

Instruction No. 3

You are instructed, that the amount of the tax liens awarded to the counties and required to be paid to them should be deducted from the stipulated value of \$7,950.35, in arriving at the amount which should be awarded to the defendant Washington Water Power Company for its interest in the lands condemned.

[Endorsed]: Filed Sep 23 1941. A. A. LaFramboise, Clerk. [228]

[Title of District Court and Cause.]

PROPOSED INSTRUCTIONS SUBMITTED
BY DEFENDANT THE WASHINGTON
WATER POWER COMPANY

Proposed Instruction No. 1

You are instructed that just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable.

The highest and most profitable use for which the property is adapted and needed, or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the full extent that the prospect for the demand of such use affects the market value while the property is privately held.

The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. To the extent that probable demand by prospective purchasers, or condemnor, affects market value, it is to be taken into account. Physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract, together with the other lands necessary for hydro-electric developments, or that another could acquire all lands or easements necessary for that use.

You are instructed that the market value of property may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy.

In making that estimate you should take into account all considerations that fairly might be brought forward and reasonably be given substantial weight

in such bargaining. The determination is to be [229] made in the light of all facts affecting the market value that are shown by the evidence, taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events in combinations of occurrences which, while in the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration.

Proposed Instruction No. 2

You are instructed that the defendants in the proof of the market value of their land, are not restricted to evidence of its value for development within itself.

You are instructed that under the laws of the State of Washington, public service corporations organized for the purpose of, and authorized by law so to do, may acquire property necessary for the public use in connection with the development of hydro-electric plants by the exercise of eminent domain.

You are further instructed that the fact that it might be necessary for a condemnor to exercise the right of eminent domain in order to acquire property for use in connection with the development of a hydro-electric plant does not negative consideration of the availability of the land here involved, for use in connection with a hydro-electric plant. Elements affecting value that depend upon events, or combinations of occurrences, which are fairly shown to be reasonably probable, may be taken into

consideration in determining what constitutes just compensation for the property involved in this proceeding.

The enhanced market value, if any, of the defendant's land, due to its adaptability for valuable uses in conjunction with other properties, may be considered if the practicability of the combination of the necessary properties upon which such availability depends, was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which the purchaser might be expected [230] to give.

The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact.

Proposed Instruction No. 3

In this case it is stipulated that the defendant's lands could not by themselves alone be used for the purpose of developing power, but that it would be necessary to combine with them the bed of the Columbia River, the lands above the dam site which would be flooded, and the right to use the flow of the stream.

This fact alone does not mean, however, that the defendant's lands have no value for power site purposes. The correct test is whether from all the evidence it appears that the union of all these necessary properties was so reasonably practical that the possibility thereof had affected the market price of defendant's land at the time of taking.

In this connection I instruct you that in considering what is just compensation you should determine the award for the property free from the effect that any of the actions of the condemnor, the United States of America, of which there is any evidence in this case, may have had on the value of the property at the time of taking.

Proposed Instruction No. 4

I instruct you that the date of taking in this case is December 9, 1939, and you must determine the value of the property as of that date; that is, its fair market value on that date. However, in this regard, I [231] instruct you that you may not consider an increased value due to the fact that the United States had by that date definitely committed itself to build the Grand Coulee project, and that this land was a necessary part of the project; and on the other hand, you should not consider any diminution in market value on that date due to any action on the part of the United States if said action reduced the value of said lands.

In other words, you must determine the value of the lands appropriated by the United States Gov-

ernment without giving any consideration whatever to the effect the action of the condemnor, the United States Government, of which there is any evidence in this case, may have had upon the value of the property at the time of taking.

Proposed Instruction No. 5

I instruct you that in determining the fair market value of the property you are entitled to take into consideration all facts admitted in evidence which an informed seller, willing but not required to sell, and an informed buyer, willing but not required to buy, would take into consideration. Specifically if you find from the evidence that the property here in question was adapted for power site purposes, and that the property either could be used for the development of water power or sold at a greater price than it would otherwise bring because of a reasonable chance that it could be used for power site purposes, then you have a right to consider all the facts admitted in evidence which would affect such value. You may consider the investment the defendant has in the property, the price at which the property has sold in the past, taking into consideration the time which has elapsed since said sales, the likelihood that the property has increased or decreased in value during the interim, the sales of similar property, if any, the fact that the property is located on a navigable river, and that the defendant, or any private owner has no inherent right to own the waters of the river, or to

erect structures in its bed, but must secure permission from the government to do so, together [232] with any or all other matters or things which the evidence in this case indicates would increase or decrease the value of the property at the time of taking.

You may also consider the opinions of the witnesses who, because of their experience, were permitted to testify as experts. Taking into consideration all these elements, you are to determine a sum in money that in your opinion represents the fair market value of the property.

In this connection, however, I caution you that in determining the value of the property at the time of taking, you must fix such value at what would be the market value at that time, free from the effects of any action on the part of the condemnor, the United States Government, of which there is any evidence in this case, which might increase or decrease the value of the property.

Proposed Instruction No. 6

I instruct you that the United States has the right to require the properties here involved by eminent domain. It is immaterial therefore, whether the United States is acquiring them in aid of navigation or not. The defendant is entitled to receive the same amount of damages whether the lands are taken for a park, a postoffice site, or as the bottom of a reservoir for the Grand Coulee Dam.

Proposed Instruction No. 7

You are further instructed that sales of land in the neighborhood and the prices received therefor, are to be disregarded by you in considering the market value of defendant's land involved in this proceeding, unless, when considered in the light of the testimony you are satisfied that there is real similarity between the land so sold and the land which is the subject of litigation in the case at bar.

Filed: Sep. 22, 1941. A. A. LaFramboise, Clerk.
[233]

[Title of District Court and Cause.]

We, the Jury in the Above Entitled Cause, find for the defendant Ferry County, in the sum of \$1033.20.

ARTHUR J. CLAUSEN
Foreman.

[Endorsed]: Filed Sep. 23, 1941. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

We, the Jury in the Above Entitled Cause, find for the defendant Stevens County in the sum of \$1950.76.

ARTHUR J. CLAUSEN
Foreman.

[Endorsed]: Filed Sep. 23, 1941. A. A. LaFramboise, Clerk. [234]

[Title of District Court and Cause.]

We, the Jury in the Above Entitled Cause, find for the defendant Washington Water Power Company, in the sum of \$7950.35.

ARTHUR J. CLAUSEN

Foreman.

[Endorsed]: Filed Sep. 23, 1941. A. A. LaFramboise, Clerk. [235]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the petitioner United States of America and moves the Court for a new trial for the reasons hereinafter set forth and upon the following grounds:

(1) That the verdict of the jury in favor of Stevens County, Wash., in the sum of \$1950.76 and the verdict of the jury in favor of Ferry County, Washington in the sum of \$1033.20 are contrary to law.

(2) Error in law occurring at the trial and excepted to at the time by the petitioner.

LYLE KEITH

United States Attorney.

B. E. STOUTEMYER

Reclamation.

District Counsel, Bureau of

Service accepted and copy received this 12th day of January, 1942.

POST, RUSSELL, DAVIS & PAINE

Attorneys for Defendants,

Washington Water Power Company,
City Bank Farmers Trust Company,
and Ralph E. Morton, Trustee.

[Endorsed]: Filed Jan. 13, 1942. A. A. LaFramboise, Clerk. [236]

[Title of District Court and Cause.]

ORDER DENYING PETITIONER'S MOTION
FOR NEW TRIAL

This matter came on before the Court on this 23rd day of January, 1942, upon the motion of the petitioner, the United States of America, for a new trial, the petitioner appearing by Lyle Keith, United States District Attorney, and B. E. Stoutemyer, District Counsel, Bureau of Reclamation, and the defendants, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as trustee, appearing by Post, Russell, Davis and Paine, and H. E. T. Herman; defendant, Stevens County, appearing by F. Leo Grinstead; and defendant, Ferry County, appearing by Osee W. Noble; the matter having been submitted to the Court for decision and the Court having been fully advised in the premises, now therefore,

It Is Hereby Ordered that said petitioner's motion for new trial be and the same hereby is denied, to which the petitioner, excepts and exception is allowed.

Done in Open Court this 23rd day of January, 1942.

L. B. SCHWELLENBACH
United States District Judge.

Approved as to Form:

LYLE KEITH
United States Attorney.

F. LEO GRINSTEAD
Prosecuting Attorney,
Stevens County.

OSEE W. NOBLE
Prosecuting Attorney,
Ferry County.

Presented By:

POST, RUSSELL, DAVIS & PAINE
M. E. T. HERMAN

Attorneys for Defendants.

O.K. as to form,

ALAN G. PAINE
H. E. T. HERMAN.

[Endorsed]: Filed Oct. 23, 1941. A. A. LaFramboise, Clerk. [237]

[Title of District Court and Cause.]

JUDGMENT

This cause having come on for trial on the 15th day of September, 1941, and the issues arising upon the petition of the plaintiff and the declaration of taking, other than those disposed of by that certain stipulation entered into between the United States of America and the Washington Water Power Company, filed in this court on August 19, 1941, having been duly tried before the Court and a jury, and the said jury having returned their verdict herein, in and by the terms of which the said jury made the following award to the several defendants herein, to-wit:

To the defendant Washington Water Power Company, a corporation, the sum of.....	\$7950.35
To the defendant Stevens County, Washington, the sum of.....	\$1970.76
To the defendant Ferry County, Washington, the sum of.....	\$1033.20

And it appearing to the Court from the records and files in the above entitled action, that under date of December 9, 1939, a declaration of taking under the provisions of (a) the Act of Congress of August 30, 1935 (49 Stat., 1039), (b) the Act of Congress of June 17, 1902 (32 Stat., 388) and all acts amendatory thereof and supplementary thereto, commonly known as the Reclamation Law, and (c) the Act of Congress of February 26, 1931 (46 Stat., 1421), Chapter 307, signed by the authority empowered by law to acquire the lands described in

the petition, was filed in the above entitled action, and that with the said declaration of taking there was deposited into the registry of the Court, to the use and for the benefit of the persons thereto entitled, on the 9th day of December, 1939, the sum of \$8,191.70, as the estimated just compensation for the following described premises, to-wit: [238]

Tract No. 1

(The Washington Water Power Company
tract)

The following described property situate in the County of Stevens, State of Washington, to-wit:

Lot one (1) in the northeast quarter ($NE\frac{1}{4}$), Lot two (2) in the northeast quarter ($NE\frac{1}{4}$), and lot three (3) in the southeast quarter ($SE\frac{1}{4}$) of Section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian (patented under date of July 22, 1896 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus) being islands in the Columbia River, containing 88.85 acres, more or less.

Also, Lot one (1), the north half of Lot two ($N\frac{1}{2}$ of Lot 2), the north half of the southeast quarter of the northwest quarter ($N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$) and the northeast quarter of the northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section twelve (12), Township thirty-six (36) North, Range

thirty-seven (37) East, Willamette Meridian, containing 93.00 acres, more or less.

Also, a tract of land containing 21.14 acres, more or less, being that portion of Lot one (1) and the southwest quarter of the northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$) of section fourteen (14), and that portion of Lots one (1) and two (2) and the southeast quarter of the southeast quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section eleven (11) (patented under date of June 8, 1891 to Joseph M. Cataldo as the Superior General of the Rocky Mountain Missions of the Society of Jesus), all in Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, lying between the east line of the Columbia River and a line described as follows: Beginning at a point on the west line of the southwest quarter of the northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$) of said Section fourteen (14), which point bears North $02^{\circ}54'10''$ west 1070.85 feet and south $87^{\circ}57'49''$ West 2630.26 feet from the quarter section corner on east line of said Section Fourteen (14); running thence North $05^{\circ}35'00''$ East 207.92 feet; thence North $36^{\circ}13'00''$ East 476.48 feet; thence North $07^{\circ}55'20''$ East 517.39 feet; thence North $00^{\circ}01'00''$ East 296.85 feet; thence North $11^{\circ}31'40''$ East 220.19 feet; to a point on the north line of said Section fourteen (14), which point bears South $87^{\circ}59'45''$ West 2141.46 feet from the northeast section corner of said sec-

tion fourteen (14); thence North $11^{\circ}31'40''$ East 184.15 feet; thence north $27^{\circ}35'10''$ east 241.46 feet; thence North $44^{\circ}34'50''$ East 285.64 feet; thence North $11^{\circ}38'10''$ West 583.14 feet; thence south $77^{\circ}21'40''$ East 335.03 feet; thence North $52^{\circ}09'20''$ east 291.35 feet; thence North $60^{\circ}55'10''$ East 338.99 feet; thence North $37^{\circ}37'10''$ East 303.06 feet; thence North $23^{\circ}43'20''$ East 456.88 feet; thence South $67^{\circ}15'00''$ east 333.86 feet; thence South $47^{\circ}22'10''$

[239]

East 305.19 feet; thence south $38^{\circ}01'00''$ East 160.95 feet to a point on the east line of said Section eleven (11), which point bears North $02^{\circ}01'13''$ West 1561.06 feet from the southeast section corner of said Section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also, Lot two (2) of Section fourteen (14), Township thirty-six (36) north, range thirty-seven (37) east, Willamette Meridian, excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway), containing 13.80 acres, more or less.

Also, a tract of land containing 79.43 acres, more or less, being all of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of sec-

tion twelve (12), and a portion of the southwest quarter of the southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$) of section twelve (12) and the Northwest quarter of the Northwest quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), all in Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the north line of the southwest quarter of the southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$) of said Section twelve (12), which point bears north $02^{\circ}01'13''$ West 1320.00 feet and North $85^{\circ}30'05''$ East 108.45 feet from the southwest corner of said Section twelve (12); running thence north $85^{\circ}30'05''$ east 2417.99 feet to the northeast corner of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of said section twelve (12); thence South $01^{\circ}37'15''$ East 1313.28 feet to the quarter section corner on the south line of said Section twelve (12); thence south $85^{\circ}20'21''$ west 1262.15 feet along the south line of said section twelve (12) to the southwest corner of the southeast quarter of the southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of said section twelve (12); thence south $03^{\circ}10'19''$ east 1185.64 feet along the east line of the northwest quarter of the northwest quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of said Section thirteen (13); thence north $30^{\circ}16'40''$ West 70.25 feet; thence North $54^{\circ}17'10''$ West 416.42 feet; thence North $34^{\circ}18'20''$ West 472.22 feet; thence North

29°05'20" West 240.05 feet; thence North 13°13'50" East 234.53 feet to a point on the north line of said Section thirteen (13), which point bears North 85°20'21" East 622.95 feet from the northwest section corner of said section thirteen (13); thence north 13°13'50" east 74.75 feet; thence North 21°36'20" west 264.07 feet; thence North 41°24'20" West 197.32 feet; thence North 28°20'00" West 219.54 feet; thence North 21°36'00" West 664.17 feet to the point of beginning [240]

The following described property situate in the County of Ferry, State of Washington, to-wit:

A tract of land containing 34.09 acres, more or less, being that portion of Lot two (2), Lot five (5) (formerly known as Lot 1) and Lot six (6) (formerly known as Lot 3), of section eleven (11), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, between the west line of the Columbia River and a line described as follows: Commencing at a point on the south line of Lot six (6) (formerly known as Lot 3) of said Section eleven (11), which point bears south 02°08'00" East 1320.68 feet and North 87°56'06" East 1977.31 feet from the quarter section corner on the west line of said section eleven (11); running thence North 05°26'30" East 493.38 feet; thence North 23°37'40" east 511.06 feet; thence south 44°39'00" East 309.36 feet;

thence north $03^{\circ}30'50''$ East 255.82 feet; thence North $10^{\circ}53'10''$ West 376.77 feet; thence north $01^{\circ}36'10''$ east 250.34 feet; thence North $38^{\circ}35'00''$ east 371.59 feet; thence south $04^{\circ}28'10''$ east 608.63 feet; thence north $12^{\circ}48'20''$ East 461.47 feet; thence North $02^{\circ}12'10''$ East 375.15 feet; thence North $63^{\circ}18'10''$ West 269.31 feet; thence North $01^{\circ}32'00''$ east 628.77 feet; thence North $08^{\circ}59'50''$ east 619.09 feet; thence North $27^{\circ}46'00''$ West 217.77 feet; thence South $81^{\circ}55'20''$ East 228.43 feet; thence North $32^{\circ}15'00''$ East 383.24 feet; thence North $56^{\circ}35'40''$ east 64.33 feet to a point on the north line of said section eleven (11), which point bears north $87^{\circ}44'41''$ east 621.57 feet from the quarter section corner on the north line of said section eleven (11); excepting therefrom such rights of way as may have heretofore been deeded to the State of Washington for State Road No. 3 (sometimes known as the Inland Empire Highway).

Also that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated October 30, 1928, as set forth in Book 5 of Miscellaneous Deeds, at page 111. of the records of Ferry County, Washington, to erect, construct, reconstruct, and maintain a gaging station together with the necessary steel tower, anchors, cables, guys and ap-

purtenances over, along and across Lot six (6) of section twenty-two (22), Township thirty-six (36) north, range thirty-seven (37) East, Willamette Meridian;

Also, that certain easement given by Ben C. Camp, a bachelor, to the Washington Water Power Company, dated September 21, 1934, as set forth in Book 5 of Miscellaneous Records, at page 299 of the records of Ferry County, Washington, to erect, construct, reconstruct and maintain a gaging station together with the necessary appurtenances over, along and across Lot three (3) of section twenty-two (22), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian. [241]

Tract No. 2

(Hummel Tract)

Also the following described property situate in the County of Stevens, State of Washington, to-wit:

A tract of land containing 21.27 acres, more or less, lying and being in the southeast quarter of the northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of section thirteen (13), Township thirty-six (36) North, Range thirty-seven (37) East, Willamette Meridian, more particularly described by metes and bounds as follows: Beginning at a point on the east line of the Southeast Quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of said section thirteen (13), which point bears North

86°09'57" east 2568.16 feet and North 03°38'34" West 247.27 feet from the quarter section corner on the west line of said Section thirteen (13); running thence North 64°49'10" West 95.80 feet; thence North 74°52'50" West 393.47 feet; thence North 63°23'20" West 522.80 feet; thence North 33°14'50" West 307.77 feet; thence North 26°06'00" West 413.09 feet to the point of intersection with the north line of the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13); thence north 85°45'25" East 1197.80 feet to the northeast corner of the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13); thence south 03°38'34" East 1105.80 feet along the east line of the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of said section thirteen (13) to the point of beginning. [242]

The said sum so deposited being allocated as follows, to-wit:

Tract No. 1 (The Washington Water	
Power Company tract)	\$7,950.35
Tract No. 2 (The Hummel tract)	241.35

and thereupon title in fee simple absolute vested in the United States of America, and said premises deemed to be condemned and taken for the use of the United States of America; and at the same time, the right of just compensation vested in the persons entitled thereto.

And it appearing to the Court that on September 24, 1941, by virtue of a stipulation between Lillian C. Hummell, the Washington Water Power Company, and the United States of America, this court entered a judgment in favor of Lillian C. Hummel, directing that the Clerk pay to the said Lillian C. Hummel the sum of \$241.35 which had theretofore been deposited into the registry of the court by the petitioner, the United States of America.

And it appearing to the Court that under the provisions of the said Act of February 26, 1931 (46 Stat., 1421) the defendants Stevens County, Washington, and Ferry County, Washington, became entitled to interest at the rate of 6% per annum on the amount finally awarded to them, from the date of taking until the date of payment;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that the award of the said jury to the defendants is the just and reasonable compensation to be allowed to the said defendants; and judgment shall be entered in favor of the Washington Water Power Company and against the United States of America in the sum of Seven Thousand Nine Hundred Fifty Dollars and thirty five cents (\$7950.35) without interest; and in favor of the defendant Stevens County, Washington, and against the United States of America in the sum of One Thousand Nine Hundred Seventy Dollars and seventy six cents (\$1970.76), with interest on said sum at the rate of six per cent per annum from December 9,

1939, until paid; and in favor of the defendant Ferry County, Washington, and against the United States of America in the sum of One Thousand Thirty Three Dollars and twenty cents (\$1033.20) with interest on [243] said sum at the rate of six per cent per annum from December 9, 1939 until paid.

It Is Further Ordered, Adjudged and Decreed that the defendants named in the Petition other than the defendants to whom the above named awards have been made have been duly served and have failed to appear, except City Bank Farmers Trust Company and Ralph E. Morton, as Trustee, both of whom have joined with the defendant, The Washington Water Power Company in the stipulation and have agreed that they have no interest in the premises involved in this action except under mortgage and deed of trust from The Washington Water Power Company and that they shall be bound by the stipulation to the same extent and in the same manner as The Washington Water Power Company. It is further adjudged and decreed that none of the defendants named in the petition, other than the above named trustees and those to whom awards have been made, had any right, title or interest in the said premises at the time of the taking by the United States, and that none of the defendants other than those to whom the above awards have been made shall have any right to share in the said awards except that the award

to The Washington Water Power Company may be paid to the said City Bank Farmers Trust Company and Ralph E. Morton, as Trustee, to apply on the mortgage or deed of trust if the attorneys for the said trustees and the said Washington Water Power Company shall so direct.

And It Is Further Ordered, Adjudged and Decreed that the above described property is condemned and that fee simple title thereto has vested in the United States of America free from liens and encumbrances.

The said defendants, The Washington Water Power Company, a corporation; City Bank Farmers Trust Company, a corporation; and Ralph E. Morton, as Trustee, having each requested the allowance of [244] an exception to the entry of this judgment, It Is Hereby Further Ordered that an exception is hereby granted to each of the defendants, The Washington Water Power Company, a corporation; City Bank Farmers Trust Company,

a corporation; and Ralph E. Morton as Trustee, to the entry of this judgment.

Done in Open Court this 14 day of March, 1942.

L. B. SCHWELLENBACH

United States District Judge.

Approved as to Form:

LYLE KEITH

United States Attorney.

B. E. STOUTEMYER

District Counsel, Bureau of Reclamation.

Attorneys for the United States
of America.

POST, RUSSELL, DAVIS & PAINE

H. E. T. HERMAN

Attorneys for defendant Washington
Water Power Company.

F. LEO GRINSTEAD

Attorney for Stevens County,
Washington.

OSSEE W. NOBLE

Attorney for Ferry County,
Washington.

[Endorsed]: Filed Mar. 14, 1942. A. A. LaFramboise, Clerk. [245]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT

Notice is hereby given that the defendants, The Washington Water Power Company, a corporation, the City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, hereby appeal to the Circuit Court of Appeals, Ninth Circuit from the final judgment entered in this action on the 14th day of March, 1942.

POST, RUSSELL, DAVIS &
PAINE

H. E. T. HERMAN

Attorneys for the defendants,
The Washington Water Power
Company, a corporation, the
City Bank Farmers Trust
Company, a corporation, and
Ralph E. Morton, Trustee.
622 Spokane Eastern Build-
ing, Spokane, Washington.

[Endorsed]: Filed Mar. 30, 1942. A. A. LaFramboise, Clerk [246]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, The Washington Water Power Company, a corporation; The City Bank Farmers Trust Company, a

corporation, and Ralph E. Morton, as Trustee, the defendants-appellants above named, as Principals, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto The United States of America, the petitioner-appellee above named in the just and full sum of Two Hundred and Fifty Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of March, 1942.

The Condition of this obligation is such, that whereas, on the 14th day of March A.D. 1942, there was a judgment made and entered in the above entitled action and court in favor of the defendant-appellant, The Washington Water Power Company, a corporation, in the sum of Seven Thousand Nine Hundred and Fifty Dollars and Thirty-Five Cents (\$7,950.35), which sum according to the terms of said judgment may at the direction of the attorneys for the undersigned defendants-appellants be paid to the defendants-appellants, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton as Trustee,

And Whereas, the above-named Principals, defendants-appellants above named, having filed with this bond in the office of the Clerk of the said Dis-

trict Court a Notice of Appeal from said judgment of said United States District Court for [247] the Eastern District of Washington, Northern Division to the Circuit Court of Appeals, Ninth Circuit,

Now, Therefore, if the said Principals, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, defendants-appellants shall pay to the United States of America, petitioner-appellee above named, all costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals, Ninth Circuit may award if the judgment is modified, not exceeding the sum of Two Hundred and Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

THE WASHINGTON WATER
POWER COMPANY,

A Corporation,

CITY BANK FARMERS
TRUST COMPANY,

A Corporation,

RALPH E. MORTON,

As Trustee.

Principals.

By ALAN G. PAINE

POST, RUSSELL, DAVIS &
PAINE

H. E. T. HERMAN

Attorneys for said above-named
principals in the above en-
titled cause.

AMERICAN SURETY COM-
PANY OF NEW YORK,

By JOSEPH BAILEY.

(Seal) Attested to by:

G. E. NEVERS,

Resident Assistant Secretary.

[Endorsed]: Filed Mar. 30, 1942. A. A. LaFram-
boise, Clerk. [248]

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANTS INTEND TO
RELY ON APPEAL

Come now the defendants-appellants, The Wash-
ington Water Power Company, a corporation, the
City Bank Farmers Trust Company, a corporation,
and Ralph E. Morton, as Trustee, and hereby make
this concise statement of the points on which they
intend to rely on Appeal:

1. The learned trial Court erred in granting the
motion of the petitioner for a directed verdict in
the sum of \$7,950.35.

2. The learned trial Court erred in refusing to admit in evidence any testimony relative to the market value of the condemned lands for power site purposes.

3. The learned trial Court erred in rejecting each of the defendants' offers of proof.

4. The learned trial Court erred in refusing to give the instructions requested by the defendants.

POST, RUSSELL, DAVIS &
PAINE

H. E. T. HERMAN

Attorneys for the defendants-appellants, The Washington Water Power Company, a corporation; the City Bank Farmers Trust Company, a corporation; and Ralph E. Morton, as Trustee.

Service of Copy of foregoing Concise Statement of the Points on Which Appellants Intend to Rely on Appeal admitted by receipt of copy thereof this 30th day of March, 1942.

LYLE KEITH

B. E. STOUTEMYER

Attorneys for Petitioner-Appellee.

[Endorsed]: Filed Mar. 30, 1942. A. A. LaFramboise, Clerk. [249]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBIT TO THE CIRCUIT
COURT OF APPEALS

Whereas the defendants, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, have filed a notice of appeal from a judgment in the above-entitled action to the Circuit Court of Appeals for the Ninth Circuit.

And Whereas the said defendants have designated as part of the record on appeal a certain document entitled "Defendants' Identification No. 2."

And Whereas said defendants' said Identification No. 2 contains voluminous maps, diagrams, and other matter impracticable to print.

And Whereas the Court is of the opinion that said original document, Defendants' Identification No. 2, should be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of a copy thereof.

Now Therefore, It Is Ordered that the Clerk of this court be and he hereby is directed to forward to the Circuit Court of Appeals for the Ninth Circuit the original document, Defendants' Identification No. 2, as a part of the record in the above-entitled cause at the time he forwards said record; that said document shall be kept by the Clerk of the Circuit Court of Appeals until the Appeal is finally terminated and then be returned to the Clerk of this Court.

Done in Open Court this 30th day of March, 1942.

L. B. SCHWELLENBACH,
Judge.

Presented by:

H. E. T. HERMAN.

Copy received this 30th day of March, 1942.

LYLE KEITH,

B. E. STOUTEMYER,

Attorneys for Petitioner-Appellee.

[Endorsed]: Filed Mar. 30, 1932. A. A. LaFramboise, Clerk. [250]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO CONSTITUTE RECORD ON APPEAL

Comes now those defendants-appellants, The Washington Water Power Company, a corporation, the City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, and hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal in the above-entitled cause, to-wit:

1. Petition for condemnation.
2. Declaration of Taking.
3. Judgment on Declaration of Taking.
4. Stipulation dated July 2, 1941 between attorneys for petitioner and attorneys for The Washington Water Power Company, the City Bank Farmers Trust Company, and Ralph E. Morton, as Trustee, Defendants.

5. Stipulation dated August 21, 1941 between the United States Attorney and Assistant United States Attorney and Attorneys for The Washington Water Power Company.

6. Judgment on Stipulation re Hummel Tract.

7. Transcript of Evidence and Proceedings (including oral opinion of the Court) omitting therefrom the following items:

(a) Pages 5 to 23, consisting of the testimony of the witnesses W. R. Hall, Chester A. Hills, Miriam Miller, and L. J. O'Connell who testified to tax matters on behalf of the defendants Ferry and Stevens Counties.

(b) The Stipulation dated July 2, 1941, which appears as Item 4 herein above.

(c) The Stipulation dated August 21, 1941, which appears as Item 5 herein above.

8. Plaintiff's Exhibit "A"

9. Defendants' Identification No. 1

10. Defendants' Identification No. 2

11. Defendants' Identification No. 3

12. Defendants' Identification No. 4

13. Defendants' Identification No. 5 [251]

14. Defendants' Identification No. 6

15. Defendants' Identification No. 7

16. Proposed Instructions submitted by Defendant, The Washington Water Power Company.

17. Verdict of the Jury as to defendant, The Washington Water Power Company.

18. Judgment.

19. Notice of Appeal.

20. Bond on Appeal.

21. Statement of points upon which Appellants intend to rely upon appeal.

22. Designation of Portions of record to constitute record on appeal.

23. Order directing Defendants' Identification No. 2 to be sent to the Circuit Court of Appeals.

POST, RUSSELL, DAVIS &
PAINE

H. E. T. HERMAN

Attorneys for the defendants-appellants, The Washington Water Power Company, a corporation, the City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee.

622 Spokane & Eastern Building, Spokane, Washington.

Received copy this 30th day of March, 1942.

LYLE KEITH

B. E. STOUTEMYER

Attorneys for Petitioner-Appellee. [252]

[Title of District Court and Cause.]

DESIGNATION OF RECORD BY PETITIONER-APPELLEE AND CROSS-APPELLANT, UNITED STATES OF AMERICA, OF ADDITIONAL PORTIONS OF RECORD TO COMPLETE RECORD ON APPEAL

Comes now the petitioner-appellee and cross-appellant, United States of America, and hereby designates the following additional portions of the record, proceedings, and evidence to be contained in the record on appeal in the above entitled cause, the said additional portions thereof to be in addition to those heretofore designated by the defendants-Appellants, Washington Water Power Company, City Bank Farmers Trust Company, and Ralph E. Morton, Trustee:

1. All that part of the record, proceedings, and evidence in the above entitled cause not designated by the said defendants-appellants, Washington Water Power Company, City Bank Farmers Trust Company, and Ralph E. Morton, Trustee, the additional portions of the record to include the following:

(a) The entire transcript of the evidence and proceedings, including in question and answer form the testimony of the witnesses W. R. Hall, Chester A. Hills, Miriam Miller, and L. J. O'Connell.

(b) All exhibits in the above entitled cause of action.

(c) The proposed instructions submitted by the petitioner, United States of America, and petitioner's exceptions to refusal of the Court to give such instructions.

(d) The Court's instructions to the jury in full, and petitioner's exceptions to portions thereof.

(e) The entire verdict or verdicts of the jury, including the portions thereof applicable to the awards to Ferry and Stevens counties.

(f) The notice of appeal or cross-appeal by the petitioner-appellee and cross-appellant, United States of America.

(g) The statement of points upon which the cross-appellant, United States of America, intends to rely upon its appeal or cross-appeal herein.

(h) Petitioner's motion for a new trial herein and the order of the Court overruling petitioner's motion for a new trial. [253]

(i) This designation of additional portions of the record to complete the record on appeal.

/s/ LYLE KEITH

/s/ B. E. STOUTEMYER

Attorneys for Petitioner-Appellee and Cross-Appellant,
United States of America.

[Endorsed]: Filed Apr. 9, 1942. A. A. LaFramboise, Clerk. [254]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered 1 to 254 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by Appellant's Designation of Portions of Record to Constitute Record on Appeal, and Appellee's Designation of Record of additional portions of record to complete Record on Appeal (except "Notice of Appeal or cross-appeal by the petitioner-appellee and cross-appellant," and "Statement of points upon which the cross-appellant intends to rely upon its appeal or cross-appeal," these documents never having been filed with the Clerk of the District Court), as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on appeal of Washington Water Power Company, City Bank Farmers Trust Company, and Ralph E. Morton, Trustee, from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Cir-

cuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that I herewith transmit to the Circuit Court of Appeals, original document marked "Defendant's Identification No. 2," as provided by Order of this Court dated March 30, 1942.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to the sum of \$36.75 and that the same has been paid in full by Post, Russell, Davis & Paine, [255] of attorneys for defendant-appellant.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid District Court, this 1st day of May, 1942.

(Seal)

A. A. LaFRAMBOISE

Clerk of the United States District Court for the Eastern District of Washington. [256]

[Title of District Court and Cause.]

PLAINTIFF'S AND CROSS-APPELLANT'S
NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on March 14th 1942, wherein the plaintiff is required to pay to the defendant Stevens

County, Washington the sum of \$1,970.76 and to the defendant Ferry County, Washington the sum of \$1,033.20 in settlement of alleged tax liens claimed by said defendants, and from that part of said final judgment wherein the plaintiff is required to pay to the defendant Washington Water Power Company the full stipulated value of the property taken, to wit, the sum of \$7,950.35 without deducting therefrom the \$3,003.96 so required to be paid in settlement of the said tax liens.

/s/ NORMAN M. LITTELL

/s/ B. E. STOUTEMYER

/s/ EDWARD M. CONNELLY

Attorneys for Plaintiff and
Cross-Appellant, United
States of America.

[Endorsed]: Filed May 15, 1942. A. A. LaFramboise, Clerk. [257]

[Title of District Court.]

UNITED STATES OF AMERICA,

Petitioner-Appellee
and Cross-Appellant,

v.

THE WASHINGTON WATER POWER

COMPANY, a corporation, et al.,

Defendants,

THE WASHINGTON WATER POWER

COMPANY, a corporation; CITY BANK

FARMERS TRUST COMPANY, a corpora-

tion; and RALPH E. MORTON, as Trustee,

Defendants-Appellants

and Cross-Appellees.

CONCISE STATEMENT OF THE POINTS ON

WHICH CROSS-APPELLANTS INTEND

TO RELY ON APPEAL

Comes now the petitioner-cross-appellant, the United States of America, and hereby makes this concise statement of the points on which it intends to rely on its cross-appeal:

1. The trial Court erred in directing the jury to bring in a verdict requiring the plaintiff to pay to the defendants Stevens County and Ferry County alleged tax liens in the aggregate amount of \$3,003.96 in addition to paying to the defendant Washington Water Power Company the stipulated reasonable value of the property.

2. The trial Court erred in directing the jury to bring in a verdict requiring the plaintiff to pay to the Washington Water Power Company the stipulated reasonable value of the property taken, to-wit, the sum of \$7,950.35, without deducting therefrom the amount of the tax liens required to be paid to Stevens County and Ferry County. [258]

3. The trial Court erred in directing a verdict that requires the plaintiff to pay \$3,003.96 more than the fair market value of the property taken.

4. The trial Court erred in refusing the plaintiff's requested Instructions Nos. 1, 2 and 3.

5. The trial Court erred in overruling the plaintiff's motion for a new trial.

/s/ NORMAN M. LITTELL

/s/ B. E. STOUTEMYER

/s/ EDWARD M. CONNELLY

Attorneys for Petitioner-Appel-
lee and Cross-Appellant,
United States of America.

[Endorsed]: Filed May 15, 1942. A. A. LaFramboise, Clerk. [259]

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true, full and complete copy of the original Plaintiff's and Cross-Appellants Notice of Appeal, and Concise Statement of the Points on

which Cross-Appellants intend to rely on Appeal in Cause No. 52, United States of America, Plaintiff, vs. Washington Water Power Company, et al., as the same remains on file and of record in the office of the Clerk of the said District Court, and that the same constitutes that portion of the record on appeal as called for in the Designation of Record by Petitioner-Appellee and Cross-Appellant, United States of America of additional portions of record to complete record on appeal, and omitted from the Transcript on Appeal in this cause forwarded to the Clerk of the United States Circuit Court of Appeals at San Francisco, California on the 1st day of May, 1942, because said instruments had not been filed on that date.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court, at Spokane this 15th day of May, A. D., 1942.

(Seal)

A. A. LaFRAMBOISE

Clerk, United States District
Court, Eastern District of
Washington. [260]

[Endorsed]: No. 10127. United States Circuit Court of Appeals for the Ninth Circuit. The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, Appellants, vs. United States of America, Appellee. And United States of America, Appellant, vs. The Washington Water Power Company, a corporation, The City

Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed May 4, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for
The Ninth Circuit.

No. 10127

THE WASHINGTON WATER POWER
COMPANY, a corporation; CITY BANK
FARMERS TRUST COMPANY, a corporation; and RALPH E. MORTON, as
Trustee,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANTS INTEND TO
RELY AND DESIGNATION UNDER
RULE NINETEEN
(C. C. A. 9)

Come now the appellants, The Washington Water Power Company, a corporation, the City Bank Farmers Trust Company, a corporation, and Ralph

E. Morton, as Trustee, and hereby make this concise statement of the points on which they intend to rely on Appeal:

1. The learned trial Court erred in granting the motion of the petitioner for a directed verdict in the sum of \$7,950.35.

2. The learned trial Court erred in refusing to admit in evidence any testimony relative to the market value of the condemned lands for power site purposes.

3. The learned trial Court erred in rejecting each of the defendants' offers of proof.

4. The learned trial Court erred in refusing to give the instructions requested by the defendants.

In accordance with subdivision 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit, the said appellants do hereby designate the following portion of the transcript of record which they think necessary for the consideration of the above enumerated points and request such portions of the record be printed, to-wit:

* * * * *

ALAN G. PAINE

H. E. T. HERMAN

Attorneys for the appellants,
The Washington Water Power
Company, a corporation; the
City Bank Farmers Trust
Company, a corporation, and
Ralph E. Morton, as Trustee.
622 Spokane & Eastern Build-
ing, Spokane, Washington.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION TO BE RELIEVED FROM
PRINTING OR REPRODUCING DE-
FENDANTS' IDENTIFICATION No. 2

Come now the appellants, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, and apply to the Circuit Court of Appeals for the Ninth Circuit for an order dispensing with the reproduction or printing of defendants' Identification No. 2 in the above entitled cause, and ask the Court that defendants' Identification No. 2 be considered by the Court in its original form without reproduction.

The reason for this application is that said defendants' Identification No. 2 is in such form that it is impracticable to copy the same as part of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit. The said defendants' Identification No. 2 is in book volume form and contains approximately 175 pages, a large part of which pages are in the form of graphs, photographs, drawings of maps and mechanical designs and many of the pages of said book are so large that they have to be folded a number of times to be properly contained within said volume.

This application is based upon affidavit of Mr. Alan G. Paine hereto attached.

ALAN G. PAINE

H. E. T. HERMAN

Attorneys for appellants, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, Ralph E. Morton, Trustee.

Approved.

R. E. STOUTEMYER

EDWARD M. CONNELLY

N. B. Atty. & Attorneys for Appellee.

State of Washington,
County of Spokane—ss.

Alan G. Paine, being first duly sworn on oath, deposes and says:

I am one of the attorneys for the above-named appellants. This affidavit is made in support of the Application for an order relieving said appellants from printing or reproducing defendants' Identification No. 2, the original of which has been sent to this Honorable Court by virtue of an order made and entered by the Honorable Lewis B. Schwellenbach, Judge of the United States District Court for the Eastern District of Washington, Northern Division. I have read said Application and the matters, allegations and things therein set forth are true.

ALAN G. PAINE

Subscribed and sworn to before me this 30 day of
April, 1942.

(Seal)

M. J. SICKAFOOSE

Notary Public residing at Spokane, Washington

So ordered:

CURTIS D. WILBUR

Senior United States Circuit Judge

[Endorsed]: Filed May 4, 1942.

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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation; CITY BANK FARMERS TRUST COMPANY, a corporation; and RALPH E. MORTON, as Trustee,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the Eastern District of Washington, Northern Division

Brief for the Appellants

ALAN G. PAINE,
H. E. T. HERMAN,
622 Spokane & Eastern Building,
Spokane, Washington,

Attorneys for Appellants.

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington,
Of Counsel.



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No. 10,127

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COM-
PANY, a corporation; CITY BANK
FARMERS TRUST COMPANY, a corpora-
tion; and RALPH E. MORTON, as
Trustee,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the District Court for the Eastern
District of Washington, Northern Division*

Brief for the Appellants

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS FOR JURISDICTION

Appellee instituted suit to condemn uplands in Ferry and Stevens Counties, Washington, belonging to the appellant, The Washington Water Power Company, by serving a petition for condemnation upon the appellants and filing the same with the Clerk of

the United States District Court for the Eastern District of Washington, Northern Division.

The statutory provision which sustains the jurisdiction of the said district court is Section 257, Title 40, U. S. C. (August 1, 1888, c. 728, Sec. 1, 25 Stat. 357).

The statutory provision which sustains the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 128, 36 Stat. 1133; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 7, 1925, c. 150, 43 Stat. 813; February 13, 1925, c. 229, Sec. 1, 43 Stat. 936) and Section 230, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 11, 26 Stat. 829; February 13, 1925, c. 229, Sec. 8(c), 43 Stat. 940) together with Rules of Civil Procedure, Rule 73 and Rule 81(a)(7).

The petition for condemnation is set forth on pages 2 to 20 of the Transcript of Record. In accordance with the practice prevailing in the state courts of Washington, no answer to the petition for condemnation was filed. Possession of and title to the said uplands was obtained by the United States Government by a judgment of taking (T. of R. p. 33) entered upon a declaration of taking (T. of R. p. 20). Final judgment was entered by the District Court on the 14th day of March, 1942 (T. of R. p. 294). Notice of appeal and bond were filed by appellant March 30, 1942 (T. of R. p. 307).

STATEMENT OF THE CASE

This is a condemnation suit brought by the United States of America to acquire a tract of upland partly in Ferry County, Washington, and partly in Stevens County, Washington, on opposite sides of the Columbia River at a point known as Kettle Falls, belonging to The Washington Water Power Company, a hydro-electric power company, operating in Eastern Washington and Northern Idaho, hereafter referred to as the Power Company. Also included was a small tract which it was agreed belonged to a Lillian Hummel, who accepted the amount deposited by the government and is no longer interested in the case.

The government condemned the property as part of the necessary reservoir for the Grand Coulee Dam. The trustees of The Washington Water Power Company's first mortgage were made parties and have joined with the Power Company in these proceedings, but as their interests are identical with those of the Power Company we will hereafter refer to the Power Company as if it were the only appellant.

The petition for condemnation together with the declaration of taking under 40 U. S. C. Sec. 258a, were filed on December 9, 1939, and at the same time the government deposited into court the sum of \$7950.35 as the estimated value of the Power Company's land. As a result of a pretrial conference the government and the appellant entered into a stipulation (T. of R. p. 43) which provided in addition to provisions relating to the admissibility of documentary evidence, that the Power Company was the owner

of the land condemned. It was further stipulated that the Columbia River is a navigable stream throughout its entire length in the United States, that the lands of the appellant Power Company were riparian lands adjoining or adjacent to that part of the river bed commonly known as Kettle Falls, and that to utilize appellant's property for power site purposes would require the construction of a dam on and across the bed of the Columbia River and the construction of various structures in the channel of said stream and between the ordinary high water line and the low water line thereof; that a complete hydro-electric power plant could not be built solely on the defendant's lands but would require the use of lands within the bed of the Columbia River.

It was stipulated, however, that there could be safely constructed at Kettle Falls, partly on the lands of the appellant being condemned and partly in the bed of the river, a dam and power house to contain water turbines and generators operated ultimately under a maximum head of 124 feet and a minimum head of 75 feet and a mean static head of 114 feet, and that it is physically practical and feasible to operate such hydro-electric power development at Kettle Falls; that the value of appellant's lands for all purposes other than power site purposes, such as agricultural, grazing and timber purposes was the sum of \$7,950.35; that if the Court should not permit the introduction of evidence relative to power site values then the award to the appellant should be the sum of \$7,950.35.

At the trial Stevens and Ferry Counties which had

been made parties defendant in the action appeared and offered evidence relative to taxes which had been assessed against the property. Stipulations were read to the jury and the government called only one witness, F. H. Banks, Supervising Engineer of the Grand Coulee Dam, who testified that the Grand Coulee Dam improved navigation on the Columbia River. Petitioner then rested.

The appellant made an opening statement of the testimony it intended to offer in which it was stated that the appellant would offer to prove among other things that the land sought to be condemned by the government was part of a larger tract of land located at Kettle Falls on the Columbia River; that this land, due to its natural formation consisting of a rocky dike across the river formed a peculiarly suitable and adaptable site at which to erect a dam and hydro-electric power development; that these lands were formerly part of the Colville Indian Reservation; that since they were released from the Colville Indian Reservation in 1906 they have had an enhanced market value for power site purposes; that they were sold for \$80,000 in 1906, resold in 1912 for \$100,000, and finally sold to The Washington Water Power Company for \$150,000 in 1921; that the appellant Power Company is a hydro-electric power company with assets in excess of seventy million dollars; that it is engaged in the production, distribution and sale of electrical energy throughout eastern Washington and northern Idaho; that the company had acquired the site for the purpose of building a hydro-electric power

plant and supplying itself with the electrical energy so generated; that the company has sufficient finances and financial backing to build the proposed development; that the proposed development would be economically profitable; that after acquiring the property the company has spent approximately \$350,000 in engineering studies preliminary to the development of the site, such studies including surveying of the back-water reservoir, diamond drilling and wash boring, preparation of plans and specifications for the erection of a dam and power plant; that the company had made an application for a license to the Federal Power Commission for the development of the site; that such application was pending until 1936 at which time it was denied because the government decided to build the Grand Coulee Dam, the building of which would of necessity require appellant's property as part of its reservoir.

Appellant further indicated its intention to prove by qualified witnesses that taking into consideration the likelihood or the lack of likelihood that the Power Company could secure a license from the Federal Power Commission for the development of the site, that on December 9, 1939, these lands had an enhanced market value greatly in excess of their value for agricultural purposes; that such market value was in the neighborhood of one-half million dollars.

Objection to the introduction of any testimony tending to prove power site values was made and the matter argued at length to the Court who sustained the objection and ruled all such evidence would be in-

admissible. The appellant then made ninety offers of proof in the form and manner suggested by the Court, covering in detail the facts as outlined in the opening statement. Objections were sustained to all of these offers of proof except those dealing with the qualifications of witnesses. The government's motion for a directed verdict in the sum of \$7,950.35 was granted and the jury at the direction of the Court returned the verdict in that amount upon which judgment was later entered.

There is but one principal question between the government and the appellant, The Washington Water Power Company presented by this appeal, to-wit: Should just compensation for uplands bordering upon a navigable stream be measured by their value for all purposes other than power-site purposes regardless of what their actual market value was at the time of taking, regardless of their suitability or adaptability for power site purposes, regardless of the likelihood that they could and would be used for power site purposes in the reasonably near future, regardless of whether the company had purchased the property for power site purposes and had expended large sums of money in preliminary and engineering development and regardless of whether the owner was financially able and ready to construct a hydro-electric project at the time the property was taken in the condemnation suit. In addition thereto a number of minor questions arose about the competency of the evidence proposed in connection with a limited number of the offers of proof.

SPECIFICATIONS OF ERROR

Specification of Error No. 1. The Court erred in entering judgment for appellant, The Washington Water Power Company in the sum of \$7,950.35 (T. of R. p. 294).

Specification of Error No. 2. The Court erred in granting over the objection of the appellant, The Washington Water Power Company, petitioner's motion that the Court direct the jury to return a verdict in favor of the appellant, The Washington Water Power Company, finding that the value of the property is the sum of \$7,950.35 (T. of R. p. 243).

Specification of Error No. 3. The Court erred in declining to give the instructions requested by the appellant, The Washington Water Power Company. The Court refused to give the proposed instructions hereinafter set out totidem verbis by the use of the following words uttered sua sponte for the purpose of making unnecessary any objection upon the part of the petitioner:

“* * * Having done that, I will also decline to give the instructions offered by the defendant, The Washington Water Power Company, and allow an exception, and may the record show in each instance that the Court has specifically ruled that there was no necessity for separate exceptions for the failure to give each separate instruction because the decision which I made upon the question of the admissibility of evidence, so far as The Washington Water Power Company is concerned, made it unnecessary for them to take separate exceptions. It would not make any difference what was in the instructions. I couldn't give the jury any instructions when ruling as I

did, and the same exception with reference to the exceptions with reference to the counties.” (T. of R. p. 249)

PROPOSED INSTRUCTION NO. 1
BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

You are instructed that just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adapted and needed, or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of the demand for such use affects the market value while the property is privately held.

The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. To the extent that probable demand by prospective purchasers, or condemnor, affects market value, it is to be taken into account. Physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract, together with the other lands necessary for hydro-electric development, or that another could acquire all lands or easements necessary for that use.

You are instructed that the market value of property may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair

negotiations between an owner willing to sell and a purchaser desiring to buy.

In making that estimate you should take into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence, taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events in combinations of occurrences which, while in the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. (T. of R. p. 283)

**PROPOSED INSTRUCTION NO. 2
BY THE APPELLANT, THE WASHINGTON
WATER POWER COMPANY**

You are instructed that under the laws of the State of Washington, public service corporations organized for the purpose of, and authorized by law so to do, may acquire property necessary for the public use in connection with the development of hydro-electric plants by the exercise of eminent domain.

You are instructed that the defendants in the proof of the market value of their land, are not restricted to evidence of its value for development within itself.

You are further instructed that the fact that it might be necessary for a condemnor to exercise the right of eminent domain in order to acquire property for use in connection with the development of a hydro-electric plant does not negative consideration of the availability of the land here involved, for use in connection with a hydro-electric plant. Elements affecting value that depend upon events, or combinations of occurrences, which are fairly shown to be reasonably probable,

may be taken into consideration in determining what constitutes just compensation for the property involved in this proceeding.

The enhanced market value, if any, of the defendant's land, due to its adaptability for valuable uses in conjunction with other properties, may be considered if the practicability of the combination of the necessary properties upon which such availability depends, was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which the purchaser might be expected to give.

The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact. (T. of R. p. 285)

PROPOSED INSTRUCTION NO. 3 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

In this case it is stipulated that the defendant's lands could not themselves alone be used for the purpose of developing power, but that it would be necessary to combine with them the bed of the Columbia River, the lands above the dam site which would be flooded, and the right to use the flow of the stream.

This fact alone does not mean, however, that the defendant's lands have no value for power site purposes. The correct test is whether from all the evidence it appears that the union of all these necessary properties was so reasonably practical that the possibility thereof had affected the

market price of defendant's land at the time of taking.

In this connection I instruct you that in considering what is just compensation you should determine the award for the property free from the effect that any of the actions of the condemnor, the United States of America, of which there is any evidence in this case, may have had on the value of the property at the time of taking (T. of R. p. 286)

**PROPOSED INSTRUCTION NO. 4
BY THE APPELLANT, THE WASHINGTON
WATER POWER COMPANY**

I instruct you that the date of taking in this case is December 9, 1939, and you must determine the value of the property as of that date; that is, its fair market value on that date. However, in this regard, I instruct you that you may not consider an increased value due to the fact that the United States had by that date definitely committed itself to build the Grand Coulee project, and that this land was a necessary part of the project; and on the other hand, you should not consider any diminution in market value on that date due to any action on the part of the United States if said action reduced the value of said lands.

In other words, you must determine the value of the lands appropriated by the United States Government without giving any consideration whatever to the effect the action of the condemnor, the United States Government, of which there is any evidence in this case, may have had upon the value of the property at the time of taking. (T. of R. p. 287)

**PROPOSED INSTRUCTION NO. 5
BY THE APPELLANT, THE WASHINGTON
WATER POWER COMPANY**

I instruct you that in determining the fair market value of the property you are entitled to take

into consideration all facts admitted in evidence which an informed seller, willing but not required to sell, and an informed buyer, willing but not required to buy, would take into consideration. Specifically if you find from the evidence that the property here in question was adapted for power site purposes, and that the property either could be used for the development of water power or sold at a greater price than it would otherwise bring because of a reasonable chance that it could be used for power site purposes, then you have a right to consider all the facts admitted in evidence which would affect such value. You may consider the investment the defendant has in the property, the price at which the property has sold in the past, taking into consideration the time which has elapsed since said sales, the likelihood that the property has increased or decreased in value during the interim, the sales of similar property, if any, the fact that the property is located on a navigable river, and that the defendant, or any private owner has no inherent right to own the waters of the river, or to erect structures in its bed, but must secure permission from the government to do so, together with any or all other matters or things which the evidence in this case indicates would increase or decrease the value of the property at the time of taking.

You may also consider the opinions of the witnesses who, because of their experience, were permitted to testify as experts. Taking into consideration all these elements, you are to determine a sum in money that in your opinion represents the fair market value of the property.

In this connection, however, I caution you that in determining the value of the property at the time of taking, you must fix such value at what would be the market value at that time, free from the effects of any action on the part of the condemnor, the United States Government, of which

there is any evidence in this case, which might increase or decrease the value of the property. (T. of R. p. 288)

**PROPOSED INSTRUCTION NO. 6
BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY**

I instruct you that the United States has the right to acquire the properties here involved by eminent domain. It is immaterial, therefore, whether the United States is acquiring them in aid of navigation or not. The defendant is entitled to receive the same amount of damages whether the lands are taken for a park, a post-office site, or as the bottom of a reservoir for the Grand Coulee Dam. (T. of R. p. 289)

**PROPOSED INSTRUCTION NO. 7
BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY**

You are further instructed that sales of land in the neighborhood and the prices received therefor, are to be disregarded by you in considering the market value of defendant's land involved in this proceeding, unless, when considered in the light of the testimony you are satisfied that there is real similarity between the land so sold and the land which is the subject of litigation in the case at bar. (T. of R. p. 290)

Specification of Error No. 4. The Court erred in sustaining the objection of appellee to Offer of Proof No. 1 by a qualified witness:

“that the Kettle Falls site has been recognized in surveys and studies as one of the most suitable and feasible sites on the river for the development of electrical energy.” (T. of R. p. 134)

Appellee's counsel objected to the foregoing offer of proof as follows:

“I object to the offer of proof upon the grounds stated in the argument.” (T. of R. p. 135)*

*Grounds urged for the objection to the foregoing offer of proof and those other offers of proof referred to in these specifications of errors, when stated in general terms by counsel for the appellee, were understood by the court and the attorneys for appellants and appellee to be as set forth in the following excerpt from the court’s ruling:

“The evidence to which the Government objects was outlined in defendant’s counsel’s statement of last Tuesday. * * *

To this offer, plaintiff interposes two objections:

1. That under the rule laid down in *U. S. vs. Chandler-Dunbar*, 229 U. S. 53, followed in *Continental Land Co. v. U. S.*, 88 Fed (2d) 104 (certiorari denied October 11, 1937, 302 U. S. 715) a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States and is, therefore, barred from a recovery for any power site value of its riparian lands.

2. That, because paragraph 12 of the pre-trial stipulation includes an admission by defendant that the backwater from a dam constructed at Kettle Falls would flood approximately 518 tracts of privately owned land and approximately 400 different ownerships and would also flood some withdrawn or reserved public land of the United States (including Indian reservation land) and also some State land, therefore defendant is not entitled to recover power site value under the rule that no owner of any one or any number of tracts less than the whole is entitled to pay or share of the value of the whole in condemnation proceedings unless there is a reasonable probability that all the ownerships could be combined.” (T. of R. p. 117)

Specification of Error No. 5. The Court erred in sustaining the objection of appellee to Offer of Proof No. 2 by a qualified witness:

“that many projects have been constructed under the provisions of the Federal Power Act, and the reasonable prices for said sites have been included as legitimate expense on the part of the companies constructing said power projects.” (T. of R. p. 135)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“I object to the offer on the grounds stated and upon the additional ground that the evidence offered is immaterial.” (T. of R. p. 135)

Specification of Error No. 6. The Court erred in sustaining the objection of appellee to Offer of Proof No. 3 by a qualified witness:

“that by the Act of August 30, 1935, the United States authorized and adopted the Grand Coulee Dam project providing for the erection of a dam of sufficient height to flood the lands of the defendant at Kettle Falls and completely eliminate the head of water at Kettle Falls; that the defendant’s land has been taken by the United States in this proceeding as a part of said Grand Coulee Dam project; that had this development as a part of which the defendant’s lands are being condemned, not been made, the defendant would at this time have been ready to construct a hydroelectric project at Kettle Falls.” (T. of R. p. 136)

Appellee’s counsel objected to the foregoing offer of Proof as follows:

“We object on the general ground and also on the

special ground that the testimony offered would be immaterial.” (T. of R. p. 137)

Specification of Error No. 7. The Court erred in sustaining the objection of appellee to Offer of Proof No. 4 by a qualified witness:

“that the shore lands of the State of Washington adjoining the property of the defendant, The Washington Water Power Company, being herein condemned were negotiated for by The Washington Water Power Company with the State of Washington; that the State of Washington, acting by and through the Land Commissioner of said state, had agreed to sell said shore lands on each side of the Columbia River to the defendant, The Washington Water Power Company, for approximately \$29,000, and that said agreement was in full force and effect and in good standing on August 30, 1935, when the United States Government authorized and adopted the Grand Coulee Dam Project.” (T. of R. p. 137)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“I object to that on the general grounds.” (T. of R. p. 138)

Specification of Error No. 8. The Court erred in sustaining the objection of appellee to Offer of Proof No. 5 by a qualified witness:

“that The Washington Water Power Company had made application to the State Supervisor of Hydraulics by Applications Nos. 708 and 709, for permits to appropriate and store waters of the Columbia River; that its applications were prior in point of time to any other applications made with reference to the use of the waters of said river; that The Washington Water Power Com-

pany did keep said applications in good standing and did pay all license fees due the State of Washington; that on July 17, 1934, the State Supervisor of Hydraulics advised The Washington Water Power Company that its applications to appropriate and store the waters at Kettle Falls would be kept in good standing until such time as the United States Government took steps to construct the high dam at Grand Coulee; that the aforesaid applications were finally canceled by the State Supervisor of Hydraulics after the United States Government started construction of said dam at Grand Coulee; and that said cancellation of said applications was the consequence of such construction by the United States of America." (T. of R. p. 138)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I object on the general ground and also the special ground that the proof, if offered, would be immaterial." (T. of R. p. 139)

Specification of Error No. 9. The Court erred in sustaining the objection of appellee to Offer of Proof No. 6 by a qualified witness:

"that as a result of and by reason of the action of the United States Government in authorizing and adopting the Grand Coulee Dam project under the Act of August 30, 1935, and by reason of the action of the United States Government in proceeding with the construction of the Grand Coulee high dam, the Supervisor of Hydraulics of the State of Washington canceled the said applications, Nos. 708 and 709." (T. of R. p. 139)

Appellee's counsel objected to the foregoing offer of proof as follows:

"We object to that upon the general grounds and

also on the special ground that it is immaterial, and furthermore, that the witness through whom the offer was made is incompetent to testify.” (T. of R. p. 140)

Specification of Error No. 10. The Court erred in sustaining the objection of appellee to Offer of Proof No. 8 by a qualified witness:

“that during the period from 1921 to 1936, the defendant, The Washington Water Power Company, entered into and conducted negotiations with the Federal Power Commission to obtain a license to develop the power site on its lands which are the subject of this litigation and said negotiations continued until the Federal Power Commission denied the defendant a license to develop said site after Congress passed the Act of August 30, 1935, authorizing and approving the Grand Coulee Dam.” (T. of R. p. 141)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“I object to that on the general grounds and on the special ground that it is immaterial and that the witness is incompetent to testify to the facts offered.” (T. of R. p. 142)

Specification of Error No. 11. The Court erred in sustaining the objection of appellee to Offer of Proof No. 9 by a qualified witness:

“that during the time the defendant, The Washington Water Power Company, was making studies relative to the development of hydro-electric power at the Kettle Falls project after it was the owner of the lands here involved, and before the Act of August 30, 1935, authorizing and approving the Grand Coulee Dam project, it obtained original records of stream flow data and

river data relative to the Columbia River extending from the Canadian border to what is known as Riekey Rapids below Kettle Falls; this river data was made use of by the Bureau of Reclamation in making plans for the development of the Grand Coulee project and in connection with their hearings before the International Joint Commission relative to the encroachment of backwater into the Dominion of Canada during the period just prior to the submersion of the Kettle Falls property by the United States; that during the time it was making such studies of the Columbia River, the defendant, The Washington Water Power Company, built a gauging station on the Columbia River in connection with its engineering studies and that said gauging station was operated during said time by the United States Geological Survey at the request of the Bureau of Reclamation." (T. of R. p. 142)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 143)

Specification of Error No. 12. The Court erred in sustaining the objection of appellee to Offer of Proof No. 10 by a qualified witness:

"that topographical maps were made by The Washington Water Power Company on the territory along the Columbia River from the Canadian border to what is known as Riekey Rapids below Kettle Falls during the time it was making the aforesaid studies, which maps were furnished to the Bureau of Reclamation at its request and used by said Bureau of Reclamation in connection with its plans for the construction of Grand Coulee." (T. of R. p. 143)

Appellee's counsel objected to the foregoing offer of proof as follows:

"we object on the general objection and the special objection that it is immaterial." (T. of R. p. 144)

Specification of Error No. 13. The Court erred in sustaining the objection of appellee to Offer of Proof No. 11 by a qualified witness:

"that the United States army engineers undertook to make a study of the Columbia River and its tributaries and a report was made, commonly known as the No. 308 report and published as Document No. 103. In this report the army engineers made use of all data obtained from the defendant in making studies of power development at Kettle Falls. All of this data was collected by The Washington Water Power Company during the time it owned said lands and during the times it was making said studies, under the direction of the District Engineer of the United States army engineers at Seattle, Washington, and a considerable part of said data was assembled at the specific request of said District Engineer of the United States army engineers." (T. of R. p. 144)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds and upon the special ground that it is immaterial and that the witness through whom the offer is made is incompetent to testify." (T. of R. p. 145)

Specification of Error No. 14. The Court erred in sustaining the objection of appellee to Offer of Proof No. 12 by a qualified witness:

“that the sum of \$156,043.35 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time they were purchased by the defendant, The Washington Water Power Company, in 1921.” (T. of R. p. 145)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“The offer is objected to on the general grounds and furthermore, on the special ground that the testimony offered is immaterial and that the purchase price of the lands is not proper testimony as to the reasonable market value.” (T. of R. p. 145)

Specification of Error No. 15. The Court erred in sustaining the objection of appellee to Offer of Proof No. 14 by a qualified witness:

“that in the opinion of the said witness the highest use to which the land involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands, taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric plant using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric

project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such land as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000.00." (T. of R. p. 147)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I object to the offer on the general grounds and upon the special ground that the witness would not be competent to testify as to the fair market value." (T. of R. p. 148)

Specification of Error No. 16. The Court erred in sustaining the objection of appellee to Offer of Proof No. 15 by a qualified witness:

"that shortly after acquiring the property The Washington Water Power Company made application to the Federal Power Commission for a preliminary permit on the 30th day of June, 1921; that a preliminary permit was issued designating said project as Project No. 229 on July 26, 1922; that after the granting of said preliminary permit The Washington Water Power Company proceeded to carry on the survey work necessary to obtain the data and information relative to the development of said site; that topographical surveys of the power site land and water surfaces contained within the limit of the project were prepared; that stream measurements were made of the Columbia River at the Town of Marcus; that

foundation explorations were carried on, consisting of diamond drilling and wash boring of the proposed site; that said permit was maintained in good standing at all times; that application for a permit under the terms of the Federal Power Commission Act was prepared and the application was made to the Federal Power Commission on July 26, 1922; that on July 16, 1925, The Washington Water Power Company filed application for a Federal Power Commission License." (T. of R. p. 149)

Appellee's counsel objected to the foregoing offer of proof as follows:

"We object to the testimony offered on the general grounds and upon the special ground that the testimony offered is immaterial." (T. of R. p. 149)

Specification of Error No. 17. The Court erred in sustaining the objection of appellee to Offer of Proof No. 16 by a qualified witness:

"that shortly after the application for the development of the Kettle Falls project was made, an application was made by The Washington Water Power Company in 1926 to develop the Chelan project. The Chelan project was a federal licensed project. That considerable correspondence developed between The Washington Water Power Company and the Federal Power Commission; that the Federal Power Commission approved and consented to the development of the Chelan site ahead of the Kettle Falls site; that the application for the Kettle Falls site was kept in good standing during this period." (T. of R. p. 150)

Appellee's counsel objected to the foregoing offer of proof as follows:

“We object to the testimony offered on the general grounds and upon the special ground that it is immaterial.” (T. of R. p. 150)

Specification of Error No. 18. The Court erred in sustaining the objection of appellee to Offer of Proof No. 17 by a qualified witness:

“that in 1928 Major Butler, District Engineer of the United States Army Engineers, requested The Washington Water Power Company to make detailed designs and to submit additional foundation data and other information relative to its application for license.” (T. of R. p. 151)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general grounds.” (T. of R. p. 152)

Specification of Error No. 19. The Court erred in sustaining the objection of appellee to Offer of Proof No. 18 by a qualified witness:

“that the request of Major Butler, District Engineer of the United States army engineers, for detailed designs and additional foundation data and other information was complied with and the information submitted.” (T. of R. p. 152)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general grounds.” (T. of R. p. 152)

Specification of Error No. 20. The Court erred in sustaining the objection of appellee to Offer of Proof No. 19 by a qualified witness:

“that in 1931 Major Butler, District Engineer of the United States army engineers, requested all of the data available of The Washington Water Power Company’s studies of the 120-foot head project, and that such request was complied with on January 15, 1931.” (T. of R. p. 152)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general grounds.” (T. of R. p. 153)

Specification of Error No. 21. The Court erred in sustaining the objection of appellee to Offer of Proof No. 20 by a qualified witness:

“that The Washington Water Power Company had completed and prepared all the necessary data, with survey maps, preliminary engineering studies for the purpose of showing that it was prepared on December 9, 1939, to start with the construction of the project.” (T. of R. p. 153)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general grounds, and upon special ground that it is not material to the controversy here whether they were going to build on December, 1939, or at a later date.” (T. of R. p. 153)

Specification of Error No. 22. The Court erred in sustaining the objection of appellee to Offer of Proof No. 21 by a qualified witness:

“that he is familiar with the moneys actually spent by The Washington Water Power Company in the development work and that they were spent under his supervision; that The Washington Wat-

er Power Company spent the sum of \$22,553.65 determining the stream flow of the Columbia River by means of various cables and supports across the Columbia River and construction of various gauges, including the automatic gauging station; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands, and that without the lands to which the said data applies, namely, the land involved herein, said data procured at the said cost of \$22,553.65 becomes valueless and useless to the defendant or to anyone except the United States Government.” (T. of R. p. 154)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general grounds and upon the special ground that the testimony as to expenditures made by the land owner would be immaterial as not having a bearing upon the fair market value for the lands in question.” (T. of R. p. 154)

Specification of Error No. 23. The Court erred in sustaining the objection of appellee to Offer of Proof No. 22 by a qualified witness:

“that The Washington Water Power Company spent the sum of \$20,597.52 installing gauges to establish water surface profiles on the Columbia River and also cross-sections of the river at these various gauges extending from the Canadian border to Rickey Rapids, a short distance between Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said land; that said sum of

\$20,597.52 was necessary for compiling of said data, and that without the lands to which the said data applies, namely, the lands involved herein, said data becomes valueless and useless to The Washington Water Power Company and to anyone but the United States Government.” (T. of R. p. 155)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general grounds and upon the special ground that expenditures made by the land owner have no tendency to prove the issues in this case as to the fair market value of the land.” (T. of R. p. 156)

Specification of Error No. 24. The Court erred in sustaining the objection of appellee to Offer of Proof No. 23 by a qualified witness:

“that The Washington Water Power Company spent the sum of \$52,268.96 in the preparation of topographical maps of the banks of the Columbia River extending from the Canadian border to Riekey Rapids, a short distance below Kettle Falls; that these maps were necessary as part of the preliminary development of the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that said sum of \$52,268.96 was necessary for the compiling of said data and that without the land to which the said data applies, namely the lands involved herein, said data becomes worthless and useless to defendant, The Washington Water Power Company, or anyone except the United States.” (T. of R. p. 156)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and upon the special ground that the offered testimony as to expenditures made upon the land in connection with any prospective use of the land would have no tendency to prove the issue of the fair market value.” (T. of R. p. 157)

Specification of Error No. 25. The Court erred in sustaining the objection of appellee to Offer of Proof No. 24 by a qualified witness:

“that The Washington Water Power Company spent the sum of \$98,970.08 to make wash borings and diamond drillings for the purpose of exploring foundations and conditions of the project; that these diamond drillings and wash borings established that there was a sound rock foundation for the building of said dam; that said diamond drilling and wash borings were a necessary part of the construction of any project on the lands here involved and that without the said lands to which diamond drilling and wash boring applied, said data becomes valueless and useless to the defendant, or anyone except the United States.” (T. of R. p. 157)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and upon the special ground that the testimony offered to prove the expenditures in connection with the prospective use of this land has no tendency to prove the fair market value.” (T. of R. p. 158)

Specification of Error No. 26. The Court erred in sustaining the objection of appellee to Offer of Proof No. 25 by a qualified witness:

“that diamond drilling and wash borings made by the defendant, The Washington Water Power Company, enhanced the value of said land; that they are valuable to a purchaser who desires to use these lands for the purpose of hydro-electric development.” (T. of R. p. 158)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objection on the general ground and the special ground that the testimony as to expenditures of this kind has no tendency to prove the fair market value.” (T. of R. p. 159)

Specification of Error No. 27. The Court erred in sustaining the objection of appellee to Offer of Proof No. 26 by a qualified witness:

“that The Washington Water Power Company spent the sum of \$106,333.23 for general engineering studies, including various investigations and preparation of necessary data, including the design of the power house and details of all of the necessary pertinent works; that the general engineering studies made by the defendant, The Washington Water Power Company, were necessary as a preliminary expense in the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that without the land to which the said data applied, namely, the land involved herein, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone else except the United States.” (T. of R. p. 159)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general grounds and upon the special ground that the expenditures for engineering studies would have no value in proving the fair market value.” (T. of R. p. 160)

Specification of Error No. 28. The Court erred in sustaining the objection of appellee to Offer of Proof No. 27 by a qualified witness:

“that the total cost of The Washington Water Power Company’s investment in this project for necessary preliminary engineering and survey work, including the cost of lands is \$465,785.97, and that said sum is fair and reasonable. That all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that without the lands here involved to which said data applies, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone except the United States.” (T. of R. p. 160)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“We object upon the general ground and upon the special ground that the evidence as to the total amount of expenditures on the land has no tendency to prove or establish the fair market value. (T. of R. p. 161)

Specification of Error No. 29. The Court erred in sustaining the objection of appellee to Offer of Proof No. 28, consisting of matters, allegations, and things set forth and contained upon pages 720 to 726, inclusive, of that report entitled, “The Columbia River and Minor Tributaries, House Document No. 103,” that portion of said report so designated having then

and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said report should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. The full substance of the matter set forth on pages 720 to 726 of said report and constituting said offer of proof cover the following matters and things:

The undeveloped Kettle Falls powersite on the Columbia is located about 70 miles north of Spokane, Washington. Reefs and an island of quartzite rock create a natural water fall of about 37 feet. The Washington Water Power Company has drilled a considerable number of holes to explore the foundations. These explorations show that suitable foundations exist for the construction of structures to produce an average water fall of 114 feet for the development of hydroelectric power. Pondage would also be created to provide for daily variation in load. Exhaustive studies of stream flow and other conditions justify a proposed installed capacity of 447,700 kw. These studies considered the construction of the Columbia Basin Irrigation project, either by the construction of a low dam at Grand Coulee or with water from the Clark Fork and Spokane Rivers. The power development which includes the construction of a gravity type dam having 13 Stoney Sluice gates and an overflow section sufficient to pass a maximum flood of 875,000 c.f.s. and Power House containing 12 main units together with all auxiliaries and provision for navigation locks, if required, is estimated to cost \$30,075,148 or \$67 per kw for public development and \$31,189,044 or \$70 per kw for private development. The difference in cost is due to different rates of interest used during construction. An estimate of cost of operation shows that all cost to produce electric

energy will be 1 mill per kwhr. for public development and 1.4 mills per kwhr. for private development. Estimates of annual operating cost frequently used by public utility companies would make the cost 2 mills per kwhr. Earlier plans of development are evidenced by a preliminary permit issued by the Federal Power Commission to The Washington Water Power Company and the resulting application for license. (T. of R. p. 161)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I make no objection on the ground it wasn't read in its entirety but do object to it upon the general grounds." (T. of R. p. 163)

Specification of Error No. 30. The Court erred in sustaining the objection of appellee to Offer of Proof No. 29 (T. of R. p. 179) consisting of Defendant's Exhibit for identification 1, (T. of R. p. 256) being a copy of the preliminary permit for Project No. 229 granted by the Federal Power Commission to the defendant, The Washington Water Power Company, said document so designated having then and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds." (T. of R. p. 180)

Specification of Error No. 31. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 30 consisting of Defendant's Exhibit 2 for identification, being a copy of the application for a Federal Power Commission license, document so designated having then and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. (T. of R. p. 180)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 181)

Specification of Error No. 32. The Court erred in sustaining the objection of appellee to Offer of Proof No. 31 by a qualified witness:

"that the witness, W. F. Miller, is the comptroller of The Washington Water Power Company and as such it is a part of his duties to keep a record of all of the expenditures and costs of The Washington Water Power Company; that the books and records of The Washington Water Power Company show that the said company has expended the sum of \$156,043.33 for the acquisition of the lands at Kettle Falls; that after deducting from said amount the stipulated and agreed value, to-wit, \$7,610, the value of the land not taken by the Government, which was originally purchased as a part of the Kettle Falls tract, the net original investment as represented by the purchase price of the land involved in this proceeding was on the 9th day of December, 1939, exclusive of interest and taxes, the sum of \$148,433.33." (T. of R. p. 181)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and upon the special ground that the investment of the company in the land not taken is not proper material testimony as to the fair market value of the lands which were taken.” (T. of R. p. 181)

Specification of Error No. 33. The Court erred in sustaining the objection of appellee to Offer of Proof No. 32 by a qualified witness:

“that the books and records of The Washington Water Power Company show that in addition to said sum expended for the purchase price of said land there has been expended for exploration, general engineering, surveying and other work in connection with the development of the project the further sum of \$317,352.64.” (T. of R. p. 182)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and the special ground that the additional investment and cost to the landowner is not material on the question of the fair market value of the land.” (T. of R. p. 182)

Specification of Error No. 34. The Court erred in sustaining the objection of appellee to Offer of Proof No. 33 by a qualified witness:

“that in addition to the sums invested in the purchase price of said lands and for exploration, general engineering, surveying and other work in connection with the development of the Kettle Falls project, the sum of \$66,832.90 was spent for taxes and fees in connection with water rights on

said Kettle Falls hydro-electric project.” (T. of R. p. 183)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the expenditures of the land-owner by way of taxes paid and fees paid for water rights are not material on the question of the fair market value of the lands taken.” (T. of R. p. 183)

Specification of Error No. 35. The Court erred in sustaining the objection of appellee to Offer of Proof No. 34 by a qualified witness:

“that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said land at the time it was purchased by the defendant, The Washington Water Power Company, in 1921.” (T. of R. p. 183)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“objected to on the general ground and objected to on the special ground that the witness Miller is not shown to be competent to testify to the fair market value of the lands at the time of their acquisition.” (T. of R. p. 184)

Specification of Error No. 36. The Court erred in sustaining the objection of appellee to Offer of Proof No. 35 by a qualified witness:

“that the witness, K. M. Robinson, is president of The Washington Water Power Company, owner of the land sought to be condemned; that he

has been president of said company since June, 1938; that prior to said time he was president of the Idaho Power Company located in southern Idaho; that he has spent his entire life since the age of eighteen in the power business, that he is familiar with the lands involved in this proceeding which are the subject of this litigation; that said lands were purchased by The Washington Water Power Company in 1921, for the sum of \$156,043.33; that the lands purchased at that time consisted of a tract of approximately 800 acres; that all of said lands at that time had little value for agriculture or timber purposes.” (T. of R. p. 184)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the cost of the land to The Washington Water Power Company is not material upon the question of their fair market value.” (T. of R. p. 185)

Specification of Error No. 37. The Court erred in sustaining the objection of appellee to Offer of Proof No. 36 by a qualified witness:

“that when the said land was acquired by The Washington Water Power Company, the purchase price thereof was fixed by the buyer and seller on the basis of suitability and adaptability of said land for the purpose of building a dam and hydro-electric development and on the reasonable likelihood that said dam could and would be built.” (T. of R. p. 185)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground there is nothing in the offer of

proof that shows that the witness Robinson participated in or had any knowledge concerning the basis upon which the sale of the lands in question was made." (T. of R. p. 186)

Specification of Error No. 38. The Court erred in sustaining the objection of appellee to Offer of Proof No. 37 by a qualified witness:

"that on December 9, 1939, The Washington Water Power Company had grown to a point where its ability to produce electric energy was less than the demands of the customers. In the ordinary course of events a power company such as The Washington Water Power Company must make arrangements to provide additional sources of power to take care of increasing demands; that on December 9, 1939, it was imperative that the company develop an additional source of power; that had the Government not authorized and established the Grand Coulee project, The Washington Water Power Company would have continued with the development of and entered upon the construction of the power project at Kettle Falls on or before December 9, 1939." (T. of R. p. 187)

Appellee's counsel objected to the foregoing offer of proof as follows:

"The offer is objected to on the general ground." (T. of R. p. 187)

Specification of Error No. 39. The Court erred in sustaining the objection of appellee to Offer of Proof No. 38 by a qualified witness:

"that he is familiar with power sites in the northwest and he knows what such sites have been bought and sold for, and by reason of his experience as president of the Idaho Power Company

and The Washington Water Power Company, he is familiar with power sites and the prices for which they are bought and sold. Due to his connection with the power industry he is familiar with what other companies in the northwest have paid to secure power sites.” (T. of R. p. 188)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground.” (T. of R. p. 188)

Specification of Error No. 40. The Court erred in sustaining the objection of appellee to Offer of Proof No. 39 by a qualified witness:

“that The Washington Water Power Company has expended the sum of \$148,433.33 for the purchase of the lands involved in this proceeding, and in addition to that The Washington Water Power Company has expended the sum of \$317,352.64 for exploration, general engineering, surveying and other work in connection with the development of the project; that all such expenditures represent a legitimate net investment of The Washington Water Power Company in the sum invested in the property; that the total legitimate net investment on December 9, 1939, was \$465,785.97; that had The Washington Water Power Company been granted a license to develop this project by the Federal Power Commission it would have been permitted to capitalize its legitimate net investment in the property, but would have been permitted to capitalize or earn no sum in excess of its legitimate net investment in the property.” (T. of R. p. 188)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and in addition upon the special ground that the expenditures of the company in connection with the acquisition and development of this land and this legitimate net investment, so-called, in the lands are not material on the question of fair market value.” (T. of R. p. 189)

Specification of Error No. 41. The Court erred in sustaining the objection of appellee to Offer of Proof No. 40 by a qualified witness:

“that interest on the sum of the total legitimate investment of \$465,785.97 for a period of three years prior to December 9, 1939, at the rate of six per cent per annum, amounted to \$83,841.47; that the total net investment plus interest for a three-year period amounted to \$549,627.44.” (T. of R. p. 189)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and upon the special ground that the evidence offered is not material upon the question of fair market value and that the interest at six per cent per annum for a period of three years prior to December 9, 1939, has no tendency to establish the fair market value.” (T. of R. p. 190)

Specification of Error No. 42. The Court erred in sustaining the objection of appellee to Offer of Proof No. 41 by a qualified witness:

“that he is president of The Washington Water Power Company, the owner of the lands involved in this proceeding; that he is familiar with the fair market value of those lands on December 9, 1939; that taking into consideration all of the uses for which the lands are suitable and adapt-

able and to which they may be devoted in the reasonably near future, and taking into consideration the likelihood or lack of likelihood that the necessary permits and consents from the Federal Government could be obtained to use said lands for a dam site or hydro-electric development, that in his opinion the reasonable market value of this property on December 9, 1939, was \$549,627.44; and further, that he was president of the company on December 9, 1939, as well as the present time.” (T. of R. p. 191)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground.” (T. of R. p. 192)

Specification of Error No. 43. The Court erred in sustaining the objection of appellee to Offer of Proof No. 43 by a qualified witness:

“that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects subject to Federal license; that he has appeared and testified before such commissions and knows the practices of the Commission in determining the legitimate net investment in connection with such projects; that he knows the amount of the expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project; that in his opinion all of such expenditures, amounting to the sum of \$465,785.97, were legitimate, proper, and fair and reasonable.” (T. of R. p. 195)

Appellee’s counsel objected to the foregoing offer to proof as follows:

“Objected to on the general ground and upon the

special ground that the opinion of the witness as to the reasonable expenditures in connection with the development of the property is not admissible or has no tendency to prove or disprove the fair market value of the land being taken in this proceeding." (T. of R. p. 196)

Specification of Error No. 44. The Court erred in sustaining the objection of appellee to Offer of Proof No. 44 by a qualified witness:

"that he is familiar with the generating facilities, power resources and the growth of load of The Washington Water Power Company, that he has participated in a number of studies to determine what additional economical power sources are available to The Washington Water Power Company; that some of the investigations and studies leading up to the development, as well as the designs, of the Hood River hydro-electric plant of the Pacific Power and Light Company, the Lewiston hydro-electric plant of The Washington Water Power Company, the Morony and Flathead hydro-electric plant of the Montana Power and Light Company were carried out under his supervision; that utilizing United States geological survey records of stream flow of the Columbia River at Kettle Falls covering a period from 1913 to 1939, and utilizing the hydraulic head to be developed at that site, the average monthly power available at Kettle Falls was determined for the initial, intermediate and ultimate stages of said development." (T. of R. p. 196)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds." (T. of R. p. 197)

Specification of Error No. 45. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 45 by a qualified witness:

“that he studied the load of The Washington Water Power Company, of eight interconnected public utilities in the northwest, and of the entire public utility load in the States of Montana, Washington and Oregon over the entire period for which records are available; that the output of the Kettle Falls plant would fit into the load requirements of The Washington Water Power system and would furnish additional low-cost power to its neighboring interconnected systems; that under increasing load conditions which were apparent as early as 1937, the construction of the initial stage of Kettle Falls would have been undertaken at about that time; that this need for additional capacity and energy is proven by the purchases of power which The Washington Water Power Company has made from the Montana Power Company, Puget Sound Power and Light Company and from the Northwestern Electric Company since 1937; that under the present rate of load growth the output of the initial installation at Kettle Falls would have been absorbed by the interconnected systems within approximately three years; that Kettle Falls is the one site on the Columbia River that lends itself best to development in stages so as to meet growing load demands without entailing excessive investment costs when the plant is first built; that general layout plans have been prepared for the initial development, intermediate development and ultimate development; that the initial development will develop 42,000 kilowatts, the intermediate development 140,000 kilowatts, and the ultimate 360,000 kilowatts; that these plans have been prepared in sufficient detail to determine the present day cost of each stage of development; that the present day cost of the initial stage of development would be \$10,735,000; that the additional cost for the intermediate stage would be \$9,674,-

000, and an additional \$10,500,000 for the ultimate stage, making a total cost for the initial stage of \$10,735,000, for the second stage, \$20,409,000, and the ultimate development, \$30,911,000; that for the ultimate development the cost per kilowatt would be eighty-six dollars; that adding \$3,205,000 for the lands and rights not owned by The Washington Water Power Company would be \$34,116,000, or the equivalent of \$95.70 per kilowatt of installed capacity; that the present day costs are higher than the costs in 1939, but present day costs have been used because the construction period of such dam would be in the neighborhood of two to three years; that the cost of a 154 kilowatt transmission line from the site to Spokane would be \$1,381,400, including terminal station facilities in Spokane; that the cost of energy from the initial stage development would be 2.3 mills at 100 per cent load factor and 3.85 mills at sixty per cent load factor; that the cost of energy for the combined initial and intermediate stages would be approximately 2.16 mills at sixty per cent load factor; that the cost of energy for the ultimate development would be approximately 1.40 mills at sixty per cent load factor; that the cost of power from Kettle Falls, even for the initial stage, would be reasonable and considerably below what the company has paid since December 1, 1939, and now pays for purchased power." (T. of R. p. 197)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to upon the general ground." (T. of R. p. 199)

Specification of Error No. 46. The Court erred in sustaining the objection of appellee to Offer of Proof No. 46 by a qualified witness:

“that based upon his experience in analyzing and evaluating water power sites on navigable and non-navigable streams, it is his judgment that the undeveloped Kettle Falls site in 1939 had a value considerably in excess of the money already invested in the site, to-wit, \$465,785.57.” (T. of R. p. 200)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground.” (T. of R. p. 200)

Specification of Error No. 47. The Court erred in sustaining the objection of appellee to Offer of Proof N. 47 by a qualified witness:

“that the completion of the initial stage of development (42,000 kilowatts) would cause a substantial increase in the value of the site to The Washington Water Power Company.” (T. of R. p. 200)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the increase in value due to the completion of the initial unit would not have any tendency to prove the fair market value in December, 1939.” (T. of R. p. 200)

Specification of Error No. 48. The Court erred in sustaining the objection of appellee to Offer of Proof No. 48 by a qualified witness:

“that the cost of power from Kettle Falls initial stage would be reasonable and considerably below what the company has paid on and since December 9, 1939, and now pays for purchased power.” (T. of R. p. 201)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the cost of power development in that project would be less than the company is paying now has no tendency to establish a fair market value.” (T. of R. p. 201)

Specification of Error No. 49. The Court erred in sustaining the objection of appellee to Offer of Proof No. 49 by a qualified witness:

“that the uplands involved herein, because of their geographic formation and topographic features, making them adaptable for the support of hydro-electric structures, have a greater value for use in connection with the Kettle Falls project than have lands which are necessary for reservoir purposes in connection with this hydro-electric project.” (T. of R. p. 202)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground.” (T. of R. p. 202)

Specification of Error No. 50. The Court erred in sustaining the objection of appellee to Offer of Proof No. 50 by a qualified witness:

“that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921.” (T. of R. p. 202)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and the special ground that the price paid in 1921 is not material on the question of the fair market value in 1939.” (T. of R. p. 202)

Specification of Error No. 51. The Court erred in sustaining the objection of appellee to Offer of Proof Nos. 51, 57, 63, and 71 by qualified witnesses, said offers of proof being similar and the substance of each thereof being:

“that the lands of the defendant, The Washington Water Power Company involved in this proceeding and for which the jury is to make an award in this proceeding, did on the 9th day of December, 1939, have an enhanced market value because of their extent, particular location and relation to the Columbia River and the rock formation on said lands, and because of the value said lands would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands.” (T. of R. pp. 203, 209, 216, 225)

Appellee's counsel objected to the foregoing offers of proof, Nos. 51, 57, 63 and 71, as follows:

“Objected to on the general grounds.” (T. of R. pp. 203, 210, 216, 225)

Specification of Error No. 52. The Court erred in sustaining the objection of appellee to Offer of Proof No. 53 by a qualified witness:

“that he is familiar with the fair market value on December 9, 1939, of the uplands of The Washington Water Power Company, located at Kettle Falls, involved in this proceeding, taking into con-

sideration all the uses for which they are reasonably suitable and adaptable; that in his opinion the fair market value of said uplands of The Washington Water Power Company on December 9, 1939, was the sum of \$500,000.” (T. of R. p. 205)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground.” (T. of R. p. 205)

Specification of Error No. 53. The Court erred in sustaining the objection of appellee to Offer of Proof No. 54 by a qualified witness:

“that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921.” (T. of R. p. 205)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and objected to on the special ground that the fair market value of the lands in 1921 has no tendency to establish the fair market value of the lands on December 9, 1939.” (T. of R. p. 206)

Specification of Error No. 54. The Court erred in sustaining the objection of appellee to Offer of Proof No. 55 by a qualified witness:

“that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939, than it was during the year 1921,

and that power site values were generally higher in the State of Washington on December 9, 1939, than they were during the year 1921." (T. of R. p. 207)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 208)

Specification of Error No. 55. The Court erred in sustaining the objection of appellee to Offer of Proof No. 56 by a qualified witness:

"that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the land as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete said hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutment for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to

purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000." (T. of R. p. 208)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds." (T. of R. p. 209)

Specification of Error No. 56. The Court erred in sustaining the objection of appellee to Offer of Proof No. 58 by a qualified witness:

"that the witness J. P. Graves purchased the lands involved in this action in 1906 for the sum of \$80,000 immediately upon the lands in Ferry County being released to public ownership upon the opening of the Colville Indian Reservation; that the lands purchased by him at that time were purchased for the purpose of their use as abutments for hydro-electric developments or dams in the Columbia River; that the lands at that time had little or no value for agricultural, grazing or other purposes; that the lands were sold by him in the year 1912 to the Granby Consolidated Mines Company for the sum of \$100,000; that the lands so sold were sold for the purpose of use as lands for the abutment of a power site development at Kettle Falls to be made by the Granby Consolidated Mining Company for use in connection with their copper mining activities; that he was a member of the Board of Directors of the Granby Consolidated Mining Company; that the Granby Company sold these lands to The Washington Water Power Company in the year 1921 for the sum of approximately \$150,000." (T. of R. p. 210)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to upon the general ground and upon the special ground that the purpose for which the lands were purchased by the witness Graves or the purpose for which the lands were sold by the witness Graves to the Granby Company and the figures on which the several sales were consummated are not admissible as having any tendency to establish the fair market value of the lands on December 9, 1939.” (T. of R. p. 211)

Specification of Error No. 57. The Court erred in sustaining the objection of appellee to Offer of Proof No. 60 by a qualified witness:

“that in the opinion of the said witness the said land is suitable and adaptable for use in connection with the development of hydro-electric power, and that in his opinion said property would have been devoted to said use on the 9th of December, 1939, or within the reasonably near future thereafter, had it not been for the Act passed by Congress on August 30, 1935, authorizing and approving the Grand Coulee Dam.” (T. of R. p. 213)

Appellee's counsel objected to the foregoing offer of proof as follows:

“We object to that on the general ground and upon the special ground that the testimony offered would be merely a conclusion of the witness.” (T. of R. p. 213)

Specification of Error No. 58. The Court erred in sustaining the objection of appellee to Offer of Proof No. 61 by a qualified witness:

“that the witness is familiar with the Rock Island site owned by the Puget Sound Power and Light

Company on the Columbia River near Wenatchee, Washington; that said power site is similar in all essential respects to the power site of the defendant at Kettle Falls, Washington; that said power site is located on the same river, which is a navigable stream; that it was necessary to secure permission from the Federal Power Commission to develop the Rock Island site; that one of the elements to be taken into consideration in determining the value of land adaptable or suitable for a power site is the amount of horsepower which it would be reasonably possible to develop at such site; that, generally speaking, the construction problems and the available market conditions at the Rock Island site and the Kettle Falls site were on December 9, 1939, so similar that the relative value per horsepower for each site is the same; that the witness is familiar with the prices that were actually paid for the lands in the Rock Island dam site; that the lands on either side of the Columbia River on which stand the abutments of the Rock Island Dam, and the island in the middle of the river at said Rock Island damsite were purchased for \$120,000 by the Puget Sound Power and Light Company in 1929; that the said lands on either side of the river on which stand the abutments of the Rock Island dam were purchased by the Puget Sound Power and Light Company before it received any license from the Federal Power Commission to develop any hydroelectric power at this point." (T. of R. p. 214)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground that the testimony of the witness as to the acquisition of the power site at Rock Island dam does not have any tendency to establish the fair market value of the site in this case or the lands in this case; furthermore, upon the special ground that the fact that the lands at Rock

Island were purchased prior to the issuance of a license by the Federal Power Commission is not material in the determination of the fair market value of the lands." (T. of R. p. 215)

Specification of Error No. 59. The Court erred in sustaining the objection of appellee to Offer of Proof No. 62 by a qualified witness:

"that in the opinion of said witness the fair market value of said property on December 9, 1939, taking into consideration all of the uses for which it was available and adaptable, and to which it might be put in the reasonably near future after said date, was the sum of \$480,000." (T. of R. p. 215)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds." (T. of R. p. 216)

Specification of Error No. 60. The Court erred in sustaining the objection of appellee to Offer of Proof No. 64 by a qualified witness:

"that in the absence of unusual conditions, uplands adaptable and suitable for supporting abutments for dams have greater values for use in connection with hydro-electric projects than have lands which are necessary for reservoir purposes in connection with such hydro-electric projects." (T. of R. p. 217)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 217)

Specification of Error No. 61. The Court erred in sustaining the objection of appellee to Offer of Proof No. 65 by a qualified witness:

“that the sum of \$156,043.33 paid by the Defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921.” (T. of R. p. 217)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and objected to on the special ground that the fair market value of the lands in 1921 has no materiality to the market value of the lands on December 9, 1939.” (T. of R. p. 217)

Specification of Error No. 62. The Court erred in sustaining the objection of appellee to Offer of Proof No. 66 by a qualified witness:

“that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939, than it was during the year 1921, and that power site values were higher in the State of Washington on December 9, 1939, than they were during the year 1921.” (T. of R. p. 218)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground.” (T. of R. p. 218)

Specification of Error No. 63. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 67 by a qualified witness:

“that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the land determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the consideration above set forth by the witness, would in his opinion be as of December 9, 1939, \$480,000.” (T. of R. p. 218)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and objected to on the additional ground that the witness has

not established his competency to testify on that question." (T. of R. p. 219)

Specification of Error No. 64. The Court erred in sustaining the objection of appellee to Offer of Proof No. 69 by a qualified witness:

"that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands as determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, \$500,000." (T. of R. p. 222)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the qualifications of the witness to testify on the value of land in this area has not been established.” (T. of R. p. 223)

Specification of Error No. 65. The Court erred in sustaining the objection of appellee to Offer of Proof No. 70 by a qualified witness:

“that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects upon navigable rivers and Government land; that he has appeared and testified before said Commission in connection with the land costs and legitimate net investment of said projects, including at least thirteen major cases; that he is familiar with the practices of the Federal Power Commission in determining legitimate net investment in Federally licensed projects; that on the average the costs allowed for power site lands has averaged approximately \$39.00 per kilowatt of primary capacity; that the abutment lands necessary for the actual construction of power house facilities are from six to seven times as valuable as the upstream storage lands; that this value has been consistently recognized, allowed and approved by the Federal Power Commission in the licensing of Federal power projects.” (T. of R. p. 223)

Appellee's counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and the special ground that one not connected with the Federal Power Commission cannot testify as to the policy of that Commission; furthermore, that some of the testimony offered would be purely speculative and constitute a conclusion of the witness as to what might or might not be done.” (T. of R. p. 224)

Specification of Error No. 66. The Court erred in sustaining the objection of appellee to Offer of Proof No. 72 by a qualified witness:

“that he has been familiar with the practices of and the policies of the United States Government for more than forty years; that the policy of the Government in connection with the development of economically feasible power projects upon Government lands or on navigable streams under the control of the Government has been to encourage and promote development of these projects under proper restrictions and licenses; that the likelihood of obtaining necessary permissions and consents to develop these projects is one of the elements considered by prospective purchasers and owners of said sites, and is one of the elements entered into in determining the fair market value of the said sites; that he is familiar with the practices and policies of the Federal Power Commission in connection with the granting of licenses for the development of power sites on the Columbia River; that the Federal Power Commission has granted licenses to private capital to own and develop a power site at Rock Island on the Columbia River and that such fact would be given consideration by the purchasers of power site land adjacent to the Columbia River.” (T. of R. p. 225)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and on the special ground that the testimony offered is speculative and based upon the opinion of this witness as to the policy of the Federal Power Commission.” (T. of R. p. 226)

Specification of Error No. 67. The Court erred in sustaining the objection of appellee to Offer of Proof No. 73 by a qualified witness:

“that he knows the amount of expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project, including the acquisition of the necessary abutment lands; that the lands involved in this proceeding, including expenditures amounting to the sum of \$465,785.97, in his opinion are legitimate, proper, fair and reasonable and would be allowed as legitimate net investment if said projects were to be licensed.” (T. of R. p. 228)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“The offer is objected to upon the general ground stated yesterday and upon the special ground that the testimony would be predicated upon the expenditures made by the landowners.” (T. of R. p. 228)

Specification of Error No. 68. The Court erred in sustaining the objection of appellee to Offer of Proof No. 74 by a qualified witness:

“that the sum of \$156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by The Washington Water Power Company in 1921.” (T. of R. p. 228)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the fair value of the land in 1921 is not in issue in this proceeding.” (T. of R. p. 229)

Specification of Error No. 69. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 75 by a qualified witness:

“that he is familiar with power site values generally throughout the United States as of December 9, 1939; that the demand for power sites was greater in the State of Washington on December 9, 1939, than it was in 1921; and that said power site values were higher throughout the United States and in the State of Washington on December 9, 1939, than they were in 1921.” (T. of R. p. 229)

Appellee’s counsel objected to the foregoing offer of proof as follows:

“Objected to on the general ground and upon the special ground that the offered testimony is obviously based upon the price paid by The Washington Water Power Company in 1921, and therefore is inadmissible as evidence.” (T. of R. p. 229)

Specification of Error No. 70. The Court erred in sustaining the objection of appellee to Offer of Proof No. 76 by means of the official records and reports of the Federal Power Commission:

“That it has been the policy of the Federal Power Commission to encourage the development of power sites upon navigable streams by financially responsible parties.

“That where the facts and circumstances surrounding the development of the power site show that the party applying therefor has the necessary financial backing to develop the site, that the amount of electricity can be properly used and disposed of, the policy of the Commission has been to grant such application.” (T. of R. p. 230)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground that there is not sufficient identification of the reports and documents of the Federal Power Commission in order to make it possible to determine whether or not such reports indicate any such general policy." (T. of R. p. 230)

Specification of Error No. 71. The Court erred in sustaining the objection of appellee to Offer of Proof No. 77 by a qualified witness:

"that The Washington Water Power Company is a public utility company organized and existing under the laws of the State of Washington; that it is a subsidiary company of the American Power and Light Company and a member of the Electric Bond and Share Company system; that on December 9, 1939, The Washington Water Power Company had sufficient assets and financial backing to have obtained the funds necessary to finance the construction of the Kettle Falls project." (T. of R. p. 231)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general grounds." (T. of R. p. 231)

Specification of Error No. 72. The Court erred in sustaining the objection of appellee to Offer of Proof No. 78 by a qualified witness:

"that he is president of The Washington Water Power Company, was such president on December 1, 1939, and has been at all times since; that on December 31, 1939, The Washington Water Power Company had book assets of \$76,235,798.39;

that it had a surplus of \$4,775,246.79; that it had a bonded indebtedness of \$22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold \$22,000,000 of first mortgage bonds bearing three and a half percent interest." (T. of R. p. 231)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and on the special ground that the financial standing of the company at the time the declaration was taken would have no tendency to establish the fair market value of the property that is being condemned." (T. of R. p. 232)

Specification of Error No. 73. The Court erred in sustaining the objection of appellee to Offer of Proof No. 79 by a qualified witness:

"that The Washington Water Power Company is a public utility company organized and existing under the laws of the State of Washington; that the company has total book assets of \$76,235,798.39 as of December 31, 1939; that it had a surplus of \$4,775,246.79; that it had a bonded indebtedness of \$22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold \$22,000,000 of first mortgage bonds bearing three percent interest; that as of December 9, 1939; The Washington Water Power Company was engaged in the production and distribution and sale of electric energy in the territory of eastern Washington and northern Idaho; that the property of Kettle Falls was held by the company as part of its total electrical system for use and development as a hydro-electric project as soon as the needs and demands of the company required its construction." (T. of R. p. 232)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 233)

Specification of Error No. 74. The Court erred in sustaining the objection of appellee to Offer of Proof No. 80 by means of the official records and reports of the Federal Power Commission:

"That the Federal Power Commission has granted many licenses for the development of hydro-electric power plants upon navigable streams; that among the principal ones so granted are the following: Henry Ford & Son (Inc.), Hudson River; Alabama Power Co., Coosa River; South Carolina Pub. Ser. Authority, Santee and Cooper Rivers; Louisville Gas & Electric Co., Ohio River; Minnesota Power & Light Co., Mississippi River; Alabama Power Co., Tallapoosa River; Ford Motor Company, Mississippi River; Susquehanna Power Co. & Philadelphia Electric Co., Susquehanna River; Lexington Water Power Co., Saluda River; Puget Sound Power & Light, Columbia River; Safe Harbor Water Power Co., Susquehanna River." (T. of R. p. 233)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 234)

Specification of Error No. 75. The Court erred in sustaining the objection of appellee to Offers of Proof Nos. 81, 82, 83, 84 and 85 by qualified witnesses, said offers of proof being similar and the substance of each thereof being:

“that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural purposes.” (T. of R. pp. 234, 235, 236, 237)

Appellee’s counsel objected to the foregoing offers of proof as follows:

“Objected to upon the same general ground.” (T. of R. pp. 234, 235, 236, 237, 238)

Specification of Error No. 76. The Court erred in sustaining the objection of appellee to Offer of Proof No. 86 (T. of R. p. 238) consisting of defendants’ Identification No. 3 (T. of R. p. 271) being a copy of the letter from the Executive Secretary of the Federal Power Commission to the President of The Washington Water Power Company stating that there appeared to be no complications which would prevent the issuance of a license for the development of the Kettle Falls Project, said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee’s counsel objected to the foregoing offer of proof as follows:

“The offer is objected to upon the general ground.” (T. of R. p. 239)

Specification of Error No. 77. The Court erred in sustaining the objection of appellee to Offer of Proof No. 87 (T. of R. p. 239) consisting of defendants’ Identification No. 4 (T. of R. p. 273) being a copy of a letter from the Executive Secretary of the Federal Power Commission, which letter informed the President of The Washington Water Power Company that he was correct in assuming that the Commission would issue a license for the project prior to the time when The Washington Water Power Company did obtain title or flowage rights over the land to be affected by the proposed development; said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee’s counsel objected to the foregoing offer of proof as follows:

“The offer of proof is objected to upon the general grounds.” (T. of R. p. 239)

Specification of Error No. 78. The Court erred in sustaining the objection of appellee to Offer of Proof No. 88 (T. of R. p. 240) consisting of defendants’ Identification No. 5 (T. of R. p. 274) being a copy of the Application for a Permit to Appropriate the Public Waters of the State of Washington, said copy of said Application having then and there been one of the documents covered by the stipulation relative to the admis-

sion of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

“The offer is objected to upon the general ground.” (T. of R. p. 240)

Specification of Error No. 79. The Court erred in sustaining the objection of appellee to Offer of Proof No. 89 (T. of R. p. 240) consisting of defendants' Identification No. 6 (T. of R. p. 279) being a copy of an Application for a Permit to Construct a Reservoir and to store for Beneficial Use the Unappropriated Waters of the State of Washington, said copy of said Application having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. Appellee's counsel objected to the foregoing offer of proof as follows:

“The offer is objected to upon the general ground.” (T. of R. p. 241)

Specification of Error No. 80. The Court erred in sustaining the objection of appellee to Offer of Proof No. 90 (T. of R. p. 241) consisting of defendants' Identification No. 7 (T. of R. p. 281) being a copy of a letter from the State of Washington, Department of Conservation and Development, Division of Hydraulics, Olym-

pia, from Charles J. Bartholet, Supervisor of Hydraulics, to The Washington Water Power Company advising that on July 17, 1934, permits to appropriate and store waters of the Columbia River were issued to the Columbia Basin Commission for the development of the project at Grand Coulee, and notifying The Washington Water Power Company that its applications to appropriate and store waters at Kettle Falls would be kept in good standing until steps were taken to construct the dam at Grand Coulee to the full height, or an elevation of 1300 feet approximately, U. S. datum, said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

“The offer is objected to upon the general ground.” (T. of R. p. 241)

SUMMARY OF THE ARGUMENT

Briefly summarized appellants' contention is this:

That it was the owner of a certain tract of land on the Columbia River which it bought at the price of \$150,000.00 for the purpose of developing into a power site and upon which it has spent several hundred thousand dollars in preliminary development work; that the government condemned the property for Federal public purposes and it is, therefore, obligated to pay the Company just compensation under the 5th Amendment; that the value of the property is to be measured by its market value for the most profitable use it is likely that it can be devoted to in the reasonably near future; that this is true even though said use requires that the property be combined with other property or rights if the likelihood that such combination can be effected is great enough to enhance the market value; that the government cannot deprive the owner of this value just because one of the constituents of the combination happens to be government property; that it was therefore error not to permit the Company to prove, as it offered to do, that the property had an established and recognized value for power site purposes; that the site had been sought after for many years by private industry and was now held by the Power Company for development purposes; that application was pending for a license to develop it; and that but for the taking by the government it would in all probability have been so developed; that to limit the award for these barren rocks to agricultural, timber or other purposes and to pay less than \$8,000.00

therefor, is to confiscate the defendant's property in plain violation of the 5th Amendment.

ARGUMENT

We regret the number of specifications of error it was necessary to burden the court with in this case but under the rules of this court it appeared to be advisable to specify as error the rejection of each offer of proof, but we see no reason why they can not all be argued together. The only question between the government and the Power Company is, did the trial court err in refusing to permit the introduction of *any* evidence of power site value in relation to the land involved, and, since its value for all other purposes was agreed upon, in directing a verdict for that amount. If this court holds that any of the evidence offered should properly be submitted to the jury, the case should be reversed and the scope and extent of the evidence properly admissible to prove power site values can be left to the determination of the district court upon a retrial. If, however, the court should feel called upon to pass upon the individual offers of proof the record shows that only as to offers Nos. 33, 34, 40, 50, 54, 60, 65, 74, were objections sustained on any other grounds than the ground of the general objection made to all the offers, and these we will discuss briefly at the close of the argument.

There are a few fundamental principles and distinctions which we believe must be kept in mind at all times in the consideration of this case.

First of all, this is an out and out condemnation or "taking" case, as distinguished from a cause of action for damages where the government's action has resulted in injury to the defendant's property without actually taking it.

Secondly, it is conceded that the government has the right to take this property and consequently the use for which it is taking it is of no materiality.

These principles are of importance here because it is the settled law that the United States may in the exercise of its right to improve navigation do many things which may cause a loss to a land owner or other individual and yet, if the act of the government does not amount to a "taking" of the property, the injury is *damnum absque injuria* and the 5th Amendment provides no protection.

Typical of these cases is *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996. In that case the claimant owned a valuable farm on an island in the Ohio River. One side constituted a landing which was used in shipping products from and supplies to his farm. The government in the exercise of its right to improve navigation built a dike on the river which substantially destroyed the landing of the claimant by preventing free egress and ingress to and from the landing. The court held that the United States was not liable for any damages, saying:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various

states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. 166 U. S. 269, 271, 272, 41 L. ed. 996, 1000, 17 S. Ct. Rep. 578."

Other cases announcing this principle are:

Seranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48;

Union Bridge Co. v. U. S., 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. Rep. 367;

Willink v. U. S., 240 U. S. 572, 60 L. ed. 808, 36 S. Ct. 422.

Equally true on the other hand is the proposition that when property is taken just compensation must be made and the purposes for which the property is taken is wholly immaterial.

In *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622, the government brought condemnation proceedings to acquire the property of the Navigation Company consisting of its franchise and locks, canals, etc., some of which at least were in the bed of a navigable river. The court held that the fact the taking was for the improvement of navigation was immaterial; just compensation must be made, saying:

"* * * Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post roads; but if Congress wishes to

take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * * *Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. * * ** 148 U. S. 312, 336, 337, 37 L. ed. 463, 471, 472, 13 S. Ct. Rep. 622. (Emphasis supplied)

The same principle is announced in:

U. S. v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 S. Ct. 349;

U. S. v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 S. Ct. 380;

Olson v. U. S., 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704;

Reagan v. Farmers Loan T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047.

Here the government by this proceeding took the absolute fee simple title of this land from the Power Company, whom it is conceded held that title, and transferred it to itself in accordance with the provisions of Sec. 258a Title 40 U. S. C. and thereby made itself liable to the rule that "no private property shall be appropriated to public use unless a full and exact equivalent for it be returned to the owner." *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, at 326, 37 L. ed. 463, 13 S. Ct. 622.

The issue then resolves itself into a determination of what is a "full and exact equivalent," measured in dollars. Of course, such exact equivalent is to be determined wholly disregarding any effect which the building of the Grand Coulee Project might have. The rule is aptly stated in *Nichols on Eminent Domain* (2d Ed.) Sec. 221, pages 675, 676, as follows:

"Sec. 221. Appreciation in Value from the Improvement Itself.

"It rarely happens that proceedings for the condemnation of land for the public use are instituted without months, years, and, in some instances, centuries of time spent in preliminary discussion and in the making of tentative plans. These discussions and plans are usually known to the owners and other persons interested in land in the vicinity of the proposed improvement, and are matters of common talk in the neighborhood. If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like the sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values, and on the other hand if it is expected that the improve-

ment will be of such a character as to benefit the surrounding land, values usually rise in anticipation of the construction of the improvement. When the taking is finally made, the question arises whether this anticipatory modification of values should be considered in awarding damages.

“If it is known from the very first exactly where the improvement will be located if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in values, for since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently it is well settled that in such case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored. * * *”

“* * * To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done; * * *”

Lewis on Eminent Domain (3d Ed.) Sec. 745, pages 1329, 1330, states the proposition thus:

“Sec. 745. Enhancement Caused by the Work or Improvement.

“* * * If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, and the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work. * * *”

Here of course the place where the Grand Coulee

Dam would be built, if it was built, was known for years in advance. We make no claim for any value whatever that our land might have gained as part of, or in any way connected with the Grand Coulee project. Likewise, it has lost no value because of the building of the Grand Coulee Dam. To hold otherwise would be to hold that all the land in the reservoir became valueless when it is was decided to build the project, as no one would purchase a piece of land which was shortly to become the bottom of a lake forever.

What, then, is the measure of just compensation?

There are a world of state and federal decisions on this question but we shall content ourselves with calling the court's attention to only a few, as the courts generally are in agreement on the rules. It is only the application of them to this particular situation that presents difficulty.

An early case, but one closely analogous on its facts, is *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792. This was a condemnation case in which the railway company sought to acquire some land known as the "Point of Rocks" on the Arkansas River near Little Rock for use as a site for a bridge across the river. The river was a navigable stream and a bridge could only be built across it under a permit from the Secretary of War. The owner of the property had no such permit and the only issue was the value of the property. The court permitted testimony of its market value for bridge site purposes and the jury returned a verdict of \$20,000 which the Supreme Court

affirmed. In discussing what just compensation is, the court said:

“What is the measure of compensation which the citizen is entitled to demand for his property when thus taken? We think the general concurrence of authority is that the true measure is the market value of the property. Mr. Cooley says: ‘The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man’s estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such cases, he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight.’ Cooley, Const. Lim. 565.

“In *Boom Co. v. Patterson*, 98 U. S. 403, the court say: ‘The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.’

“A frequent source of confusion in cases of condemnation is that property sometimes seems to have a value other than and different from its market value. Bouvier, in his definition of ‘value,’ says: ‘This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called the value in use, the latter value in exchange.’ Webster recognizes a difference between ‘intrinsic’ and ‘exchangeable’ value. Webst. Dict. ‘Value.’ We also read in the

law-books of the *pretium affectionis* which sometimes attaches to property, and is recognized by the courts. This theory that property may have more than one value does not go, however, without dispute. Judge Lumpkin, in *Harrison v. Young*, 9 Ga. 359, says that 'the value of land, or anything else is the price it will bring in the market.' Whether this theory of different values is well or ill founded, we think that everyone who has had experience in trying condemnation cases will corroborate us in saying that such an idea obtains to a great extent among those who are called to testify as to the value of property.

"* * * Since, then, the market value is the criterion of damages, we are led to inquire, what is the market value? The word 'market' conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And, when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value

at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value; but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for unless his estimate was attacked on his cross-examination; in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps, we should say, cumulative, facts, to support, the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge.

“* * * As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury, and the opposing counsel for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to

make. This is only another way of stating the rule laid down as follows in *Boom Co. v. Patterson*, supra: *'In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.'*

“Taking this rule as a line of departure, we proceed to determine the point—We may say the only point—which counsel have made the subject of controversy in their briefs; that is to say, whether it was competent for appellees to adduce evidence to show the value and advantages which the Point of Rocks possessed as a bridge-site. The counsel for appellant contends that the fact that the Point of Rocks constitutes an eligible bridge-site is not properly admissible as an element of value in this case. But, inasmuch as the counsel each accuse the other of misstating his contention, it will perhaps be safest to allow the counsel for appellant to state his position in his own way. We accordingly quote from his brief as follows: *'We contend that, having a special right under the laws of Arkansas to construct the road which we have constructed, and of erecting said bridge, and the defendants not having shown any such, or similar right, that the defendants cannot have damages based upon a use to which they could not have put the property, but only for being deprived of the right to devote the property to such uses as the law allows them to devote it to.'* *'If Woodruff did not have the right to bridge the Arkansas, he has not been deprived of anything but his land.'* This is asking us to put fetters on the market value, if it is not a proposition to discard it as a criterion of damages altogether. It can hardly be doubted that, if Woodruff had gone upon the market to sell this property, he would not have concealed the fact that it possessed superior advantages as a bridge-site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if

one had been about to purchase this property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge-site. Railroad and bridge companies do not condemn all the land they make use of in their location. The amount they obtain in this way constitutes, perhaps, a small per cent of what they utilize. They are frequently in the market as purchasers, and they are sometimes in a position to dictate very favorable terms. We think the probable demand that there may be for suburban land for depot and bridge-sites is a recognized factor in the market value of property in some cases. *All that lends value to anything that we possess is the fact that other people want it, and are willing to pay the money to get it. If it were announced that a point of rocks on the Mississippi river at Hopefield, opposite Memphis, was offered for sale upon the market, it is easy to predict that there would be no lack of bidders, and that the price offered would be very much above what the property would be 'worth as a piece of land.' In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained authority to build a bridge.*" 5 S. W. 792, 793, 794, 795. (Emphasis supplied)

We think the analogy of this case is particularly apt because it disposes of the contention which the government so strongly relies on here, namely, if the Power Company had no right to build the dam and power house it has not been deprived of anything but its land. The answer to the appellee's argument, as pointed out so ably by the court, is that such a ruling would put fetters on the market value, because even though the owner lacks the legal right to build a dam, still, if his land would command a higher price in the market than land unsuited for dam purposes, he is entitled to such

value when his land is taken from him by condemnation.

The Arkansas Court placed much reliance on the case of *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. This also was a condemnation suit brought by the Boom Company to acquire title to some islands belonging to Patterson in the Mississippi River. The sole issue was whether the islands had a special value for boom purposes or only value for agricultural purposes. The jury fixed their value at \$300 for all purposes other than boom purposes and \$9,358.33 for boom purposes. The Mississippi is a navigable river and Patterson had no authority or license to put a boom across it, and the Boom Company did and contended therefore, the islands had no value to Patterson for boom purposes. The court said:

“* * * In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

“So many and varied are the circumstances to be taken into account in determining the value of

property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

“The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

“* * * Aside from this, we do not think that the State is precluded by anything in the charter of the Company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the Company the owner is deprived of the value which the lands,

by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the Company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the Company, lost this element of value in his property. * * *” 98 U. S. 403, 407, 408, 409, 25 L. ed. 206, 208, 209.

To the same effect see also *Simpson v. Shepard*, 230 U. S. 451, Ann. Cas. 1916A, 18, 48 L. R. A. (N. S.) 1151, 57 L. ed. 1563, 33 S. Ct. 729, considering availability for railroad purposes; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 77, 57 L. ed. 1081, 33 S. Ct. 667, considering availability for public purpose of land appropriated for canal and lock purposes; *In re Ashokan Dam*, 190 Fed. 414; *Brack v. Mayor, etc. of Baltimore*, 125 Md. 382, 384, 93 Atl. 995, 996, considering availability for reservoir purposes; *San Diego Land etc. Co. v. Neale*, 78 Cal. 69, 3 L. R. A. 86, 20 Pac. 375, allowing value of property for reservoir purposes; *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 457, 30 Pac. 722, admitting evidence of its value for any use for which adapted. (Rose's Notes on United States Reports, Vol. 10, pp. 579, 580)

The case of *Olson v. United States*, 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704, is very helpful in the solution of this problem. It was a condemnation suit brought by the United States to acquire title to lands bordering on the Lake of the Woods in Minnesota which were going to be inundated by the impounded waters from a dam built in Canada under a treaty whereby the United States was to acquire the overflow rights on the American side of the lake. Olson owned

55 acres of land below the overflow contour and claimed damages on the theory his land was valuable as part of the reservoir. The court did not decide as a matter of law that since Olson's land was on a navigable body of water, and since the outlet was in Canada, he had no legal right to create a reservoir and had, therefore, lost nothing; but after considering the evidence at great length held that all the facts surrounding the situation were such that the land had no market value for reservoir purposes and that the owner could not claim as damages any part of the value which the lands had to the government as a reservoir site.

"That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. * * *

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. ed. 206, 208; *Clark's Ferry Bridge Co. v. Public Serv. Commission*, 291 U. S. 227, ante, 767, 54 S. Ct. 427, 2 Lewis, Em. Dom. 3d ed. Sec. 707, p. 1233; 1 Nichols, Em. Dom. 2d ed. Sec. 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility

of combination is reasonably sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York v. Sage*, 239 U. S. 57, 61, 60 L. ed. 143, 146, 36 S. Ct. 25. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, *ubi supra*. * * * 292 U. S. 246, 255, 256, 78 L. ed. 1236, 1244, 1245, 54 S. Ct. 704.

This expresses exactly appellant's contention. In order to complete a hydro-electric development, appellant's property, a damsite, had to be combined with the necessary overflow easements and with the permission of the government to erect the structure and to use the water of the river; but in the language of Justice Butler (*supra*) such combination may be considered in ascertaining value "if the possibility of combination is reasonably sufficient to affect the market value."

The court goes on then to point out the type of enhanced value the owner is not entitled to.

" * * But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land*

*combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. * * **” 292 U. S. 246, 256, 78 L. ed. 1236, 1245, 54 S. Ct. 704. (Emphasis supplied)

We do not ask consideration for any such value here. We claim no part of the value of this land as part of the Grand Coulee Project. The market value we claim is based upon the assumption that the Coulee Dam had never even been thought of, much less built.

The court then continues:

“Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (*United States v. New River Collieries Co.*, 262 U. S. 341, 344, 67 L. ed. 1014, 1017, 43 S. Ct. 565) is lacking, the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 124, 68 L. ed. 934, 941, 44 S. Ct. 471. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that

would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. * * *” 292 U. S. 246, 257, 78 L. ed. 1236, 1245, 1246, 54 S. Ct. 704.

In line with the reasoning of the Olson case, the courts hold that a land owner is entitled to any value which his land has because of the chance or likelihood that it can or will be devoted to some special use. For example: The Supreme Judicial Court of Massachusetts expresses the rule in two leading cases as follows:

In *Moulton v. Newburyport Water Co.*, 137 Mass. 163, the question involved the value land might have for water reservoir purposes. The court said:

“* * * The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or probability that, in the future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighboring towns. *Such chance or probability must needs enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it.* If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. * * *” 137 Mass. 163, 167. (Emphasis supplied)

And in *Sargent v. Merrimac*, 196 Mass. 171, 81 N. E. 970, the same court reaffirmed this principle, saying:

“* * * The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, plus such sum as a purchaser would have added to that value because of the chance that the land in question might be some day used as a water supply. *Moulton v. Newburyport Water Co.*, 137 Mass. 163. * * *” (196 Mass. 171, 81 N. E. 970, 971)

In *Ford Hydro-Electric Co. v. Neely*, 13 Fed. (2d) 361 (C. C. A. 7) the court holds squarely that:

“* * * The availability of the land for the development of water power, and the value of it for such purposes, was a proper element to be considered by the jury in fixing its market value. * * *” (13 Fed. (2d) 361, 362)

And so:

“* * * This being an element proper to be considered, it could not be excluded, but plaintiff in error could have asked the court to instruct the jury that they should take into consideration the probability or practicability of so uniting all the lands as to make the water power appertaining to the lands of defendants in error available.” (13 Fed. (2d) 361, 362)

In practically every power site case there is the question of the owner's ability to combine his property with that of others to make a complete project. The question of the likelihood of such combination or the reasonableness of it, is for the jury unless the situation is such as the *Olson* case or the *Continental Land* case, that the court can hold as a matter of law that the evidence is conclusive that no such probability exists.

Andrews v. Cox, 17 Atl. (2d) 507;
Brown v. Forest Water Co., 62 Atl. 1078;

Marine Coal Co. v. Pittsburgh, M. & Y. R. Co.,
92 Atl. 688;

Union Electric Light & Power Co. v. Snyder
Estate, 65 Fed. (2d) 297.

Appellant here contends it was entitled to have submitted to the jury all the facts which in all probability would have been considered by a willing seller and a willing buyer. We believe to hold that a willing seller and a willing buyer would not consider the prior sales of this property, its physical adaptability for a power development, and the likelihood or probability that the necessary consents for a development could have been obtained is to utterly disregard the rule above referred to as well as the realities of the situation. We believe further that to deny us the right to offer any such evidence, denies us the right to just compensation guaranteed by the 5th Amendment.

The trial judge, however, felt that regardless of the general principles enunciated by the Supreme Court, that he was bound by the ruling of this Court in the case of *Continental Land Co. v. United States*, 88 Fed. (2d) 104 (C. C. A. 9), which he felt could not be distinguished from the case at bar. In this regard he said:

“I am forced to the conclusion that there is no real distinction between the facts of this case and the facts of the *Continental* case. Therefore, despite my determination to permit the introduction of this testimony if a way could be found to justify it, I am now convinced that it would be of service to no one to take the time or to expend the money necessary to permit the introduction of defendant's proposed testimony. It may well be that the Circuit Court will decide that on the basis

of the different facts of this case it will make a different ruling from that in the Continental case. Until then, I am bound by that decision.” (T. of R. p. 132)

We sincerely believe that not only is the Continental Land Company case distinguishable from the case at bar, but that when properly interpreted, it is an authority for the appellant’s contention.

The facts of the Continental Land Company case are as follows: The lands on either side of the Columbia River where the Grand Coulee Dam now stands were owned on December 27, 1933, by The Continental Land Company, Samuel J. Seaton, Julius C. Johnson, and William Rath’s estate. The land itself was semi-arid, uncultivated, suitable only for grazing, but contained a granite wall or dike extending under and across the river, at which point a tremendous dam, the largest structure ever built by man, could be built. From this dam an area of 1,243,000 acres could be irrigated, 2,646,000 horsepower developed. “The cost of putting in the foundation before any head is secured for power development purposes is about \$60,000,000. The completed structure will cost \$197,000,000!” (88 Fed. (2d) 106)

At the trial the government called qualified witnesses who testified that leaving out of consideration any value for the government project and taking into consideration every other possible use or value, the value was a few thousand dollars for each tract, that none of the lands had any value for dam site or reservoir purposes. Engineers of the Reclamation service,

including F. H. Banks, Supervising Engineer, testified that the site would have no value to anyone except the government; that the investment and the carrying charge during the development period would be too great for private investment. (88 Fed. (2d) 106)

The defendants called several hydro-electric engineers as expert witnesses who figured the cost of a dam, the amount of power which could be developed, the market for power, the probable profits from the sale of this power, and then gave opinions as to what the site would be worth. These values ranged from \$2,300,000 to \$4,500,000! At the close of the defendant's case the judge granted a motion to strike all of the defendant's evidence of power site value, because as he said, "That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power." (88 Fed. (2) 108)

The decision on appeal by this court affirming the district court is deserving of the most careful scrutiny. The case was heard by Garrecht and Haney, Circuit Judges, and Neterer, District Judge, and the opinion written by Judge Neterer. The court first fully analyzes the statutes authorizing the building of the Grand Coulee Dam, sets forth the facts showing the tremendous magnitude and cost of the undertaking, points out the testimony of the government engineers that such a project could not be developed by private capi-

tal. The opinion then proceeds to analyze the testimony of the defendant's witnesses, again emphasizing the magnitude of the project and the testimony on cross examination that private capital was not and never had been interested in acquiring this land for power site purposes.

"Some of these witnesses on cross-examination stated they did not know why private capital did not purchase these lands and had not sufficient knowledge to answer the question as to why the property was not purchased in 1929. Others testified that there is no market for such dam site purposes, and that the discussion about the Grand Coulee project during recent years has been a discussion with reference to the attempt to get the Government interested in building that project and there never has been any private enterprise contemplated. * * * in all that time for development of the project.' There was no market for a dam site of such size as this location. Another witness testified that none of the lands had a market value for a dam site or reservoir in 1933."

... * *

"I do not know of any large sales of damsite property at that location or anywhere else in that vicinity at that time, or at any time near that date. There was some purchase of property by the Niagara-Hudson Power Company for the St. Lawrence development during that period. Just exactly what dates I don't know. That is adjacent to a thickly populated country. I do not know of any such sales anywhere in the Northwest. No very large projects were constructed to my knowledge during the period of the depression. There were no hydro-electric developments started in the Northwest during the period between 1930 and 1934. There was no need for them at that time. During that time nobody would have financed such

construction. Financing construction requiring \$70,000,000.00 would be found very improbable. It would be foolish to construct a development where there was no necessity for power at that particular date, December, 1933 * * *.''' 88 Fed. (2d) 104, 107.

What was the purpose of so carefully summarizing all of this testimony? The answer would seem to be obvious; it was to show that the Grand Coulee Project was so gigantic that only the government could build it; that therefore the lands had no increased market value for power purposes other than their value to the taker, the government, and that the owners could claim no *additional hypothetical value* based upon the inherent value of the water power in the river; first, because they had no ownership to such water power and, second, because the likelihood of their lands being used for power-site purposes by anyone other than the condemnor was so remote that it had not enhanced the market value of these lands one dollar over their value for agricultural or grazing purposes and so should not be considered by the jury.

If, on the other hand, the court intended to say, as the government contends, that no land adjacent to a navigable stream can have value for power site purposes no matter how sought after by private capital, no matter what the prices bid and paid for such land on the open market, and no matter how likely the use of the lands for such purposes was, then three-fourths or more of the court's opinion was unnecessary, misleading, and mere dicta.

After setting up the evidence the court proceeds to

discuss the first proposition stated by Judge Webster (the trial judge) as follows:

“* * * ‘That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power. * * *’

“Again the court said: ‘These owners, in my judgment, are not entitled to have that adaptability of this site taken into account for the reason they have neither title to the bed of the stream nor any right to the waters which flow in it as against the Government exercising dominant power to improve the stream for navigation purposes, and that they are not entitled to that because it has not been taken from them, and it hasn’t been taken from them for the simple reason that they never owned it in the first place.’ ” 88 Fed. (2d) 104, 108, 109.

The opinion also states: “The court could well rest affirmance upon the statement of Judge Webster in striking from the jury’s consideration the evidence relating to dam site value.” 88 Fed. (2d) 104, 109. Under the facts of the Continental case we think this is correct. Judge Webster felt and rightly so, that the millions claimed were based upon a claim to the right to the “water running in the navigable stream or its potential water power.” This they should not be compensated for because they did not own it and therefore had suffered no loss. Likewise, they did not own the bed of the river and no compensation was due them for that. There being no creditable evidence whatever that the uplands had any value on the market

above their agricultural value, the only value the two to four million dollars could relate to was the value of the power inherent in the fall of the water in the river. True, the experts attempted to relate their values to the market value of the uplands by stating that private capital was interested in these lands and would pay such higher prices for them, but this court disposed of that contention by saying, "The speculative theorizing of expert witnesses as to private capital's seeking this site for development is of no value." (88 Fed. (2d) at page 111)

We make no claim here to the value of the bed of the river or the value of the water power as such because we admit we own neither. All we claim is the market value of the Power Company's land, taking into consideration all uses to which such lands might reasonably be devoted in the reasonably near future, even if such use required the combination with property of others.

In discussing the first question, namely, whether the Continental Land Company had any right to the value of the water power, this court goes on to point out that the title to the bed of the Columbia River is in the State of Washington, which is not disputed; that Congress has the power to remove obstructions and forbid the use of the river or cut off the riparian owner from direct access to deep water, as in *Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, heretofore cited as one of the non-taking cases. The court then cites *United States v. Chandler-Dunbar Water Power*

Company, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, as decisive of the case and quotes this portion of the case:

“The government had dominion over the water power of the rapids and falls, and *cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use.* These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact. ‘* * * The question is what has the owner lost, and not what has the taker gained.’ ” 229 U. S. 53, 76, 57 L. ed. 1063, 1080, 33 S. Ct. 667. (Emphasis supplied)

We will discuss the Chandler-Dunbar case more fully later in the brief, but let us examine this quotation here.

First it must be read in connection with this language used in the opinion (229 U. S. 53, 81, 57 L. ed. 1063, 1082) “The owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes.” What then is meant by the phrase, “any hypothetical additional value to a riparian owner”? Additional to what? Clearly additional to the fair market value which it is admitted must be paid. If it is *additional* to this value of course it is not part of it. What is meant by hypothetical? Webster’s New International Dictionary defines it as “Characterized by, or of the nature of, a hypothesis; *assumed without proof*, for the purpose of reasoning and deducing proof, or of accounting for some fact.” The Supreme Court explains the phrase thus in the Chandler-Dunbar decision:

“These ‘additional’ values were based upon the erroneous hypothesis that that Company (Chandler-Dunbar Water Power Company) had a private property interest in the water power of the River, not possibly needed now or in the future for purposes of navigation and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horse power. * * *” 229 U. S. 53, 75, 76, 57 L. ed. 1063, 1080, 33 S. Ct. 667. [Words in parenthesis supplied.]

In other words, in addition to the recognized market value it was assumed without proof, that the riparian lands had a value equal to the value of the horse power which could be developed in the stream. This is exactly what was claimed in the Continental case, where the market value was a few thousand dollars. The hypothetical additional value was several million, being the assumed value of the horse power which could be developed in the Columbia River—but that claim of value was denied and properly, we think.

This court continuing in its decision, points out that the Continental Land Company seeks to escape the ruling in the Chandler-Dunbar case against “hypothetical additional” value by referring to the value of their land as its “inherent adaptability.” Inherent adaptability carries with it the meaning that regardless of other factors, if the quality or characteristic of adaptability to power purposes exists in, or as is said, is “inherent” in a piece of property, that characteristic of itself possesses value which must be compensated for if taken by eminent domain. Of course, this is not so. Just as an example, there may exist in the wilds of Alaska a geological formation of rocks and a

river that from an engineer's point of view could be made into an ideal power plant, yet it would have no market or commercial value whatever. Likewise, here in Washington there existed land which could be made into a power site, yet because of the magnitude and cost of the project it had no market or commercial value. Both sites had "inherent adaptability" or "hypothetical additional value," but the owner of neither would be entitled to compensation for this supposed value. These phrases are used by Judge Neterer as synonymous in his opinion when he says on page 110:

"No persuasive merit is impressed by argument that the court in this case [U. S. v. Chandler-Dunbar] was dealing with water power as a separate unit of property and inherent adaptability of the land ('hypothetical additional value') as here contended for was not considered." 88 Fed. (2d) 104, 110. [Words in brackets supplied.]

The court then goes on to close its opinion on this point with this language:

"The claim of appellants has no substance, it has no possessory status; it is based upon something which is not possessed, and not being possessed, it has to appellants no value, and appellants lost nothing. *The question is, what have appellants lost, not what appellee gained.* Boston Chamber of Commerce v. Boston, 217 U. S. 189, 194, 30 S. Ct. 459, 54 L. ed. 725." 88 Fed. (2d) 104, 110.

Let us apply this test to the two cases. In the Continental Land Company case, what had the Land Company lost—nothing but its land. What had it paid for its land—nothing but a few thousand dollars. What could it have sold its land for—nothing but a few thou-

sand dollars. To what use could it put its land then or in a reasonable time in the future—only to an agricultural or grazing use. What did the court award it—the same few thousand dollars for which it could have sold it and which represented the value of the use to which it could be put. How then was it damaged? The answer of course is obvious; it was not, and the decision of the court was correct.

In this case, however, what has The Washington Water Power Company lost? Its land. What had it paid for its land? \$150,000. What had it spent in improving its land for power generation purposes? About \$350,000. What could it have sold its land for? In the neighborhood of \$500,000. To what use could it put its land then or in a reasonable time in the future? It had the finances to build a hydro-electric plant; it had a \$70,000,000 system ready to use the electrical energy generated; it had made arrangements to secure the necessary rights and additional lands; it had an application pending before the Federal Power Commission which would have been granted had not the government decided to build Grand Coulee and condemn its property. What did the Court award it? \$7,950.35!! What has it lost? The difference between what it could have sold its property for at a free sale at the time of taking upon the market and what it has been given by the government at a forced sale,—in this case several hundred thousand dollars.

Naturally this court did not feel it could close the Continental Land Company case at this point as to do so would only have half disposed of the case. It would

only have held that riparian lands on a navigable stream, which are physically capable of being used for power purposes, i.e., possess ("inherent adaptability") hold no value on account of that fact alone, and that such lands because of the value of the water that flows by them have acquired no ("hypothetical additional value"). However it would have left open the question: Did the lands in fact have an enhanced market value because of the likelihood that they could be used for power purposes in the reasonably near future?

So the court proceeded to analyze the facts and to show that in the Continental Land Company case this element of value did not exist.

The court said:

"It may also be said that the lands had no inherent value for the purposes claimed by the appellants, unless in probable combination with other lands, for private use. There is no evidence that there was any reasonable probability of combination in a *reasonably near future*, or at all, of these lands for private use. *No capital was seeking the lands for use.* When diversity of ownership is considered (900 private owners—600 parcels) government lands, state lands, Indian reservation land, Indian allotted land, withdrawal of reclamation lands, the full control of the United States of the water and river bed for navigation (see *Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236), the capital required for investment and consideration of the testimony of conditions in districts to which capital did go and judicial knowledge of the congressional attitude with relation to such permission, and the requirements for the granting of such benefits; the population in the tributary territory, and other hydro-

electric plants, Priest Rapids, Washington Power Company, including Chelan Falls and a number of other subsidiaries, Bonneville, City of Seattle Department of Lighting (Steam Plant and Skagit Project), Federal Power Commission Project No. 552, and Project No. 1215, Puget Sound Power & Light Company, including following plants: (Nooksacke Falls, Baker River, White River, Shuffleton Steam), Tacoma Railway, Light & Power (including Lake Cushman plant), Idaho Light & Power Company, in tributary territory of the Grand Coulee Dam. *Greeson v. Imperial Irr. Dist.* (C. C. A. 9) 59 F.(2d) 529, 530, at page 531; *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551, 13 Ann. Cas. 957; *The Apollon*, 9 Wheat. (22 U. S.) 362, 6 L. ed. 111. There is not left the shadow of a doubt that there was no reasonable probability of utilizing this land by private capital. There was no offer of proof that this land was sought by private capital; that there was any movement to interest private capital. On the contrary, the testimony shows that all of the agitation had been for a government dam. The speculative theorizing of expert witnesses as to private capital's seeking this site for development is of no value. * * *" 88 Fed. (2d) 104, 110, 111. (Part of emphasis supplied)

In other words, the court says there was no evidence these lands were sought for private use. It then takes judicial notice of facts that affirmatively show private capital would not be interested. These facts relate to the population of the territory tributary to Grand Coulee; the other available developments, which included Priest Rapids, a site in the same Columbia River, the sites of The Washington Water Power Company "including Chelan Falls and a number of other subsidiaries," chief of which, of course, is the Kettle Falls site, the identical property involved here,

which private capital would purchase and develop in preference to Grand Coulee. And so, says the court, there is left no "shadow of a doubt that there was no reasonable probability of utilizing this land by private capital."

But what happens in the case at bar? When we attempted to offer proof that private capital was ready to develop this site (a fact of which this court took judicial notice in the Continental case), the trial court held such evidence inadmissible!

Judge Neterer then goes on to cite the case of *McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205, as pointing the way.

That case involved no navigable stream, no improvement of navigation; it was just a condemnation suit to acquire 4080 acres of land in the island of Oahu for a federal public purpose. Yet, says Judge Neterer, it points the way for all condemnation suits, whether the land is being acquired in connection with the improvement of navigation or not.

The question in the *McCandless* case was whether the jury should consider the possibility of bringing water to the land and irrigating it, which would naturally increase its value. The court held such evidence admissible and stated the rule:

"The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not

necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. *Olson v. United States*, 292 U. S. 246, 255, 256, 78 L. ed. 1236, 1244, 1245, 54 S. Ct. 704.” 298 U. S. 342, 345, 80 L. ed. 1205, 1208, 56 S. Ct. 764.

This court concluded its opinion in the *Continental Land Company* case by commenting as follows on the holding in the *McCandless* case:

“There is no such record here. No proof was produced, no offer was made, of any possibility reasonably near or remote or at any time that the land would be or could be so used. There is no error.” 88 Fed. (2d) 104, 111.

In the case at bar appellants offered to prove all the things suggested as necessary. We offered to prove that these lands, as soon as they were released by the Government for sale, had always been bought and sold upon the basis of their power site values, at prices ranging from \$80,000 to \$150,000; that the appellant had paid \$150,000 for the lands, and that it had spent nearly \$350,000 in preparing the lands for power site development; that it had done everything required of it to secure all the necessary state and federal permission; that at the time its lands were taken it was ready, able and intending to devote them to power site uses.

The conclusion seems inescapable that the holding of the *Continental Land Company* case is this: That riparian lands on a navigable stream have no value because of their inherent adaptability for power site purposes, that they have no added value because there is water power in the stream that flows by them, but if there is

a possibility of combining them with the water in the river and the other lands necessary for a reservoir, and such possibility is one that is reasonably sufficient to affect the market value, the owner is entitled to such enhanced market value when his property is taken by eminent domain.

This conclusion is strengthened by a consideration of the case of *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667.

That case was a condemnation proceeding brought by the United States against the power company under a special act of Congress. It involved the improvement of navigation in the St. Marys River at Sault Sainte Marie, Michigan. The St. Marys River is a navigable river which forms the International Boundary at this point and through which the traffic between Lake Superior and the other Great Lakes is carried. The Chandler-Dunbar Company owned various parcels of land along the river and had erected some wing dams and other structures in the river under revocable permits from the Secretary of War. The company claimed that in addition to the value of its lands and structures it was entitled to \$3,450,000 for "the undeveloped water power of the river at St. Marys rapids in excess of the supposed requirements of navigation." The lower court allowed \$550,000. Justice Lurton states the question as follows:

"From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the

water power capacity of the rapids and falls of the St. Marys river which has been 'taken,' and for which compensation must be made under the 5th Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?" 229 U. S. 53, 60, 57 L. ed. 1063, 1074, 33 S. Ct. 667.

The court then analyzed this claim at length and pointed out that the ownership of riparian lands gives no ownership of the river; that Congress could, as it did, improve navigation and forever bar the erection of structures in the river and yet not "take" any property of the owner of adjacent land, and reaches this conclusion:

"The conclusion, therefore, is that the court below erred in awarding \$550,000, or any other sum, for the value of what is called 'raw water,' that is, the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land." 229 U. S. 53, 74, 57 L. ed. 1063, 1080, 33 S. Ct. 667.

"* * *

Of course we have never claimed anything for "raw water." The multi-million dollar claim in the Continental Land Company case was in actuality for "raw water" no matter if it was disguised as "inherent adaptability" of the uplands.

Having disposed of this main claim, the court considered next the award for the uplands. The Company owned a narrow strip bordering on the river, having an area of something more than eight acres. The court allowed for this property:

"a. For its value, including railroad side tracks,

buildings, and cable terminal, including also its use, 'wholly disconnected with power development or public improvement, that is to say, for all general purposes, like residences, or hotels, factory sites, disconnected with water power, etc., \$20,000.' "

"b. For use as factory site in connection with the development of 6,500 horse power, either as a single site or for several factories to use the surplus of 6,500 horse power not now used in the city, an additional value of \$20,000."

"c. For use for canal and lock purposes, an additional value of \$25,000." 229 U. S. 53, 74, 57 L. ed. 1063, 1080, 33 S. Ct. 667.

To awards "b" and "c" the government objected.

The court held that the value in sub-division "a" was proper. Item "b" was discarded as an "additional" value, "based upon the erroneous hypothesis that the company had a private interest in the water power of the river," but as to item "c" the court held it was proper, using this language:

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes *must be overruled*. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. *Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to*

the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. Lewis, Em. Dom. Sec. 707; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. ed. 206, 208; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 S. Ct. Rep. 361; Young v. Harrison, 17 Ga. 30; Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, 13 S.W. 123; Sargent v. Merrimac, 196 Mass. 171, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Mississippi & R. Boom Co. v. Patterson was this: A boom company sought to condemn three small islands in the Mississippi river, so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. This court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned. The court said, touching the rule for estimating damages in such cases:

“ ‘So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.’ ”

“In Shoemaker v. United States, *supra*, lands were condemned for park purposes. In the court below the commissioners were instructed to estimate each piece of land at its market value, and that, ‘the market value of the land includes its

value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that is, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use,—e.g., to the use of a public park,—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.’ The court approved this instruction.” 229 U. S. 53, 76, 77, 78, 57 L. ed. 1063, 1081, 33 S. Ct. 667. [Emphasis supplied]

This award, we think, is of vital significance. The upland in the Chandler-Dunbar case could not of course be used for canal and lock purposes without making use of the water of the river. One cannot operate a canal and locks without water! Yet, the riparian owner had no legal right or ownership to the water of the navigable stream and the government could prevent its diversion if it chose. So the owner could not build and operate these canals and locks without government permission. Thus it might well be said that when the land was taken from him he *lost nothing* in not being paid for the value of his lock site, but the court did not so hold. On the contrary, it said, “That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative.” In other words, if the use to which the property can be put, even though in combination with the water of a navigable stream, is real and imminent, so that the value of the land is affected

by it, it is a real value which belongs to the owner. There is no fundamental difference between diverting the water through a canal, running it through a lock and returning it to the river, and diverting it through a penstock, running it through a turbine and returning it to the river.

The portion of the Chandler-Dunbar case last here-inbefore quoted was cited with approval in the following cases:

—Brooks-Scanlon Corp. v. United States, 265 U. S. 126, 68 L. ed. 942, 44 S. Ct. 475, holding damages allowed for requisitioning by government of contract for ship partly constructed are amounts which probably could have been obtained for assignment of contract and all rights therein in fair negotiation between owner willing to sell and purchaser desiring to buy.

—United States v. New River Col. Co., 262 U. S. 344, 67 L. ed. 1017, 43 S. Ct. 567, holding compensation for export coal taken by government for war purposes is determined solely by market value of export coal at time taken.

—C. G. Blake Co. v. United States, 275 Fed. 866.

—National City Bank v. United States, 275 Fed. 860, holding just compensation for coffee requisitioned by United States is fair market value, and not cost plus five per cent.

—Emmons v. Utilities P. Co., 83 N. H. 186, 58 A. L. R. 794, 141 Atl. 68, holding riparian owner not precluded from proving market value of land for water power merely because such is being condemned for that purpose.

—Re New York City, 230 App. Div. 45, 243 N. Y. Supp. 68, holding exclusion in condemnation proceedings, of evidence concerning availability of res for apartment house sites is reversible error.

—Re Bronx Pkwy. Comm., 192 App. Div. 413, 182 N. Y. Supp. 761, holding market value of vacant land under condemnation by parkway commission may have as element of value prospective use for railway purposes. (Rose's Notes on United States Reports, 1932 Supp. Vol. 7, pp. 1108, 1109)

This court undoubtedly recognized the force of this part of the Chandler-Dunbar case in the Continental case and for that reason took pains to point out that the use contemplated by the land company was wholly conjectural and speculative.

The learned trial judge felt that the Continental Land Company case was controlling upon him because he felt that the same questions and the same arguments were presented in that case. In order to assure himself of this he carefully read the briefs in the Circuit Court in that case, as appears from his written ruling. (T. of R. pp. 116, 123) Speaking of the Continental Land Company's brief he said:

"Appellants then proceeded into a detailed argument of the points which I have just outlined. While the language that they used was different, I am convinced after careful study of it that, in its fundamental effect, the appellants presented there precisely the same argument as has been so ably presented by defendants' counsel here. While they cited other cases which have not been cited to me and while they failed to cite some of the cases which counsel has cited to me, it is apparent that the cases upon which they mainly relied were precisely the same cases upon which defendants rely here—Mississippi River Boom case and the Monongahela Navigation case, *Olson v. United States* and that portion of the Chandler-Dunbar opinion in which allowance for canal and lock purposes was approved by the Supreme Court. Of particular importance is the statement of summary and conclusion found on Page 66 of their brief as follows:

‘SUMMARY AND CONCLUSION

1

‘We Believe That It Is Fair to State That the Following Facts Are Established Either By

Admission or By Competent Evidence.

‘1. That Appellants’ lands, which are taken in these proceedings, are uplands, situated above ordinary high water mark.

‘2. That Appellants’ uplands possess inherent adaptability for use as a damsite.

‘3. That they are the only lands in existence which are suitable and available for a damsite useful for the development of hydro-electric power, and for irrigation, by using Grand Coulee as a storage reservoir.

‘4. That these uses can be accomplished only by building a dam across the Columbia River at Grand Coulee and that no such dam can be built without using appellants’ lands.

‘5. That, at the time of taking there was a market for appellants’ lands for use as a damsite by others than the Government, and that there was a “legal and practical possibility” of their being acquired and used for that purpose.

‘6. That, the market value of these lands was greatly increased because of their adaptability for a damsite, and that their market value cannot be determined except by considering such adaptability.” (T. of R. pp. 123, 124, 125)

What he failed to properly distinguish was this, that this court in deciding the case held that items one to four in the summary were not in themselves sufficient to justify a recovery and that items five and six were wholly devoid of proof. “There is not left the shadow of a doubt that there was no reasonable probability

of utilizing this land by private capital.” (88 Fed. (2d) at page 111.) Had the Land Company had evidence to support items five and six, and had this evidence been rejected, then these cases would be indistinguishable and the lower court would have been correct. Of course, since the Land Company believed the testimony of their witnesses was sufficient to support items five and six, the cases cited were the same in general as ours, and the arguments the same, but when the court rejected the evidence as insufficient, naturally the result was different.

Further indicating how he viewed the matter Judge Schwellenbach gave an example which he stated he purposely made absurd in order to better illustrate the point that the investment in a property might be very great and the value still very small. The example he chose was that of a person who had built a very expensive and very modern hospital for nervous cases, along side the tracks and yards of a railroad company; and he pointed out that despite the heavy investment the place would have no market value for a sanitarium. (T. of R. p. 131) Granted—but assume now that the railroad was a government railroad and the government was going to condemn the sanitarium for a Veterans’ Mental Hospital and it was reasonably probable that it planned to reroute the railroad through another part of town. Could the government then say: “We can keep the railroad here, and so your property is valueless, but of course as soon as we get the property we will reroute the road and use the property for the purpose for which you have spent thousands of dollars

in improving it"? Or would the court not say: "The owner is entitled to be paid what this property would bring on the market, and if the likelihood of the government's rerouting the railroad is great enough so that prospective buyers of this property would pay more for it than they would for an adjoining piece of ground which had not been improved for sanitarium purposes, the owner is entitled to have a jury determine that value from all the facts and circumstances."

Still the trial court stated that despite all this he would be inclined to allow the question to go to the jury were it not for the case of *U. S. v. Appalachian Power Company*, 311 U. S. 377, 85 L. ed. 243, 61 S. Ct. 291. Frankly we do not think this case is in point. It was an injunction action brought by the United States to enjoin the Appalachian Electric Power Company from proceeding with the construction of a power plant in the New River which it was alleged was a navigable river. The principal question was the factual one of the navigability of the river. The court held the river navigable and therefore the Federal government had dominion over it and could permit or forbid the erection of structures in it and since it had the power to forbid, it could permit the erection upon terms such as embodied in the licensing provision of the Federal Power Act, 16 U. S. C. Sec. 797, 799, 801, 804, 807, even though thereby "riparian rights may pass to the United States for less than their value." The court is careful to distinguish however between the right of the government to control the use of the river, which it may do without compensation to the riparian land

owner, and the right to take these riparian lands by eminent domain. As to the latter it said:

“If the Government were now to build the dam, it would have to pay the fair value, judicially determined, ⁸⁹ for the fast land; nothing for the water power.⁹⁰” 311 U. S. 377, 427, 85 L. ed. 243, 263, 61 S. Ct. 291.

⁸⁹ *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 S. Ct. 622.

⁹⁰ *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 66, 76, 57 L. ed. 1063, 1076, 1080, 33 S. Ct. 667.

This aptly illustrates the existing government policy in regard to the development of power in our navigable streams. It is in reality a partnership arrangement between the land owner or power company and the government. Neither is in a position to proceed with the development alone because one owns the fast lands essential for the abutments of the dams and the power house structures, and the other controls the flow of the river, essential to the generation of power. That of course does not mean that these elements are valueless. It simply means that the land owner can not claim the whole value for his lands, or the “hypothetical additional value of the water power.” On the other hand, “If the government were to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power.”

The government might have adopted many ways to dispose of its interest in the water power. It could have required an outright payment to it of a lump sum. It could have required annual payments in the

nature of rent. What it did do was to require the taking out of a license limited to 50 years, 16 U. S. C. Sec. 799, at which time the government could take over the property by paying the licensee's net investment as defined in 16 U. S. C. Sec. 804.

The Power Commission can also determine the actual legitimate original cost of, and the net investment of a licensed project, 16 U. S. C. Sec. 797. It is this provision that is most significant because it is only this "net investment" which can be capitalized and shown on the Company's books and it is this "net investment" which is used in determining the rate base of the Company. The net investment includes the lands necessary for the project as well as the structures built thereon. Only the "actual legitimate original cost" may become part of this net investment. No hypothetical additional value will be considered. Sec. 807, Title 16 U. S. C. provides that at any time after the issuance of a license the United States or any State or municipality may take over the property by eminent domain proceedings upon payment of just compensation.

As we contended in legal argument and later offered to prove, it has been repeatedly established that the actual cost of the lands, if honestly arrived at, and likewise the engineering and surveying expenses are part of the legitimate net investment. (*Alabama Power Co. v. McNinch*, 94 F(2) 601; *Northern States Power Co. v. F. P. C.*, 118 Fed (2d) 141)

If the government's contention in this case is correct, we have then, this very anomalous situation. A

company, we will say the defendant, buys land on the open market, suitable for the location of a power plant, pays therefor \$150,000, applies for a Federal license, spends \$350,000 in engineering and surveying. The license is granted and the \$500,000 is recognized as a legitimate original cost, and the next day the government or a municipality decides to condemn the property; without question the award that the condemnor must pay will have to be predicated upon a consideration of such original cost of \$500,000. However, if the condemnation took place the day before the license is granted, the compensation is only the value for agricultural purposes—say \$8,000.

It is to our minds illogical to claim that the granting of a license bestowed on the licensee any value that he did not have before. The whole purport and intent of the act is to limit the values to the actual market costs, but it realizes that power sites are worth more than agricultural land, that they will and do command a higher price and this higher price is legitimate. This higher price must, however, be an honest and real price, actually incurred, not an unearned incremental value, or one that is speculative or hypothetical. Appellant, The Washington Water Power Company, offered to prove (T. of R. p. 223) that such values were recognized by the Federal Power Commission in its own licensed plants and in many others, including the Puget Sound Power & Light Company plant at Rock Island in the Columbia River. There land was sold for \$120,000 which had practically no value for agricultural purposes (T. of R. pp. 214, 215). It is our con-

tention, therefore, that the government operating under the restriction of the 5th Amendment cannot take our property *before* a license is granted on the theory it is only valuable for agricultural purposes, if in fact its actual value has been enhanced by the demand for similar power sites, and *on the day after a license is granted* be required to pay power site values for the same land.

Judge Schwellenbach apparently did not understand our contention that the value we were seeking was only the value that our lands, as abutment sites, would contribute to the whole project. He felt that it could have no value for power site purposes unless we had the right to use the river. As he said "None of these prospective purchasers would have been interested in it had they known that they *could not build* a dam across the river at that point." (Emphasis supplied) (T. of R. pp. 129, 130). Of course that is true, and if the law were that no one except the government could build a dam across the river it would have had no value. The situation in the Continental Land Company case was that no one but the United States could build a dam, though there the impossibility of building the dam was not a legal one, but was one created by the magnitude of of the project. Here, however, it was not a fact that the purchaser could never build a dam across the river. The fact is, that the owner could not build a dam without permission, but the likelihood of getting such permission was so great that it did affect the value. Just as in the McCandless case (298 U. S. 242, 80 L. ed. 1205, 56 S. Ct. 764), the owner would not have been entitled

to a higher price for land had it *been known he could not get the water*, yet though he did not have the water, still he was allowed a higher price because the possibility of getting the water was great enough to affect the value. Judge Schwellenbach further said: "The use of the bed of the river and the flow of the stream is inseparably connected with the use of the adjoining uplands in creating a value for power site purposes." (T. of R. p. 130) This again is true, but that does not prove that the uplands have no value as an inseparable part of the whole.

Nor does it do to say that when as part of the Grand Coulee project the Government announced that the Kettle Falls site would be submerged and no development would be permitted, that it could thereby with one hand destroy its value and with the other take it at its depreciated value.

Such action in the few instances in which it has been attempted has received the severe castigation of the courts.

In the case of *In Re South Twelfth Street*, 66 Atl. 568, the City of Allentown, Pennsylvania, sought to condemn a strip of land for a street. Before the value was fixed the city had plotted the street and forbidden the erection of buildings on the bed of the proposed street and then the Machiavellian minds of the city council produced the delightfully simple idea that since no buildings could be built on it, the land could be condemned for practically nothing. But the Supreme Court of Pennsylvania thought otherwise and said:

"* * * Equally untenable is the other position taken, viz., that, if the true measure of compensa-

tion be the market value of the land when taken, the fact that no compensation could be recovered for the removal of any buildings erected on the bed of the proposed street after the same had been plotted is to be considered as a circumstance affecting such market value. *This is simply asserting the right of confiscation in a modified form, only feebly disguised.* By reason of the plotting the owner is virtually denied the privilege of building on his land, and it is argued that, with this privilege extinguished, the land would have a much reduced value in the estimation of the average buyer. *Of course, it would. But who is responsible for this reduction? Not the owner. The impairment of value resulted from nothing he had done, but as the immediate consequence of the steps taken by the municipality towards the appropriation, in invitum, of the owner's land. In the present case it is quite clear that without the right to build upon the land, this narrow strip, 60 feet wide, located as it is, would be of little, if any, value. This, then, is the contention, that the municipality in the furtherance of public ends, having stripped the land of nearly its entire value, now, when it seeks to accomplish fully its purposes in connection therewith, is to be allowed to acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the constitutional provision which requires in all such cases just compensation to be made for the property taken. * * ** 66 Atl. 568, 569 (Emphasis supplied)

The same court reaffirmed the rule when the condemnation was brought by a railroad company, *Herman v. North Pennsylvania R. Co.*, 113 Atl. 828:

“While the 12th Street case was an instance of appropriation of land by a municipality, the early plotting and subsequent taking being by the same corporation, yet, wherever real estate, containing

a previously plotted but unopened street is taken by the right of eminent domain, the principles announced in that authority must apply, or we would have the feebly disguised confiscation there referred to, and that to the benefit of the condemning corporation, which would pay for the land appropriated at its impaired value, and then, when the actual opening occurred, collect damages for such impairment; but, as previously noted, *such an injustice is avoided by recognizing the fact that, although the impairment of value from the plotting is noncollectible, and no damages can be had by anyone until the appropriation takes place, nevertheless all the while an inchoate right exists in the persons who own the land, so far as such impairment of value is concerned, the latter, as before said, being the 'consequence' of 'steps taken toward the appropriation.'*” (113 Atl. 828, 829) (Emphasis supplied)

In the case of *In Re Gibson and City of Toronto*, Am. & Eng. Ann. Cases 1914 B, 507, the Ontario Court of Appeals had before it a very similar situation. The City of Toronto was planning to widen one of its streets and passed a by-law (ordinance) “to prevent any building upon the seventeen-foot strip in the meantime and until the city expropriated it in order to widen St. Clair Avenue to that extent.” However, the City was not allowed to assert this fact to acquire the land on the basis that it had no value for building purposes, the Court saying:

“* * * It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which

it is contemplating expropriation.” Am. & Eng. Ann. Cases 1914 B, 507, 510, 28 Ont. L. Rep. 20.

And again:

“It would indeed be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property which it was about to acquire.” Am. & Eng. Ann. Cases 1914 B, 507, 508, 28 Ont. L. Rep. 20.

In regard to the offers of proof, the court sustained objection to all of them on the general ground that no evidence of power site values was admissible in addition as to offers Nos. 33, 34, 40, 50, 54, 60, 65, 74 it sustained special objections.

Offer of proof No. 33 (Specification of Error No. 34) was an offer to prove by the comptroller of The Washington Water Power Company that the Company had paid \$66,832.00 to the State of Washington for taxes and fees for the water rights at Kettle Falls. We think this evidence is material and admissible for the reason it shows part of the investment of the Company in the property, which in a case of this type is a proper element to be considered in arriving at just compensation. (*Powellson v. U. S.*, 118 Fed. (2d) 79).

Offers of proof Nos. 34, 50, 54, 65, and 74 (Specification of Errors No. 35, 50, 53, 61, 68) all were offers to prove by various qualified witnesses that the price paid by the Power Company in 1921 of \$156,043.33 was a fair and reasonable price for the lands at that date. Ordinarily such testimony would be immaterial, but we believe in this case it is for this reason: As previ-

ously pointed out the Federal Power Act fixes the values of licensed projects as their legitimate original cost. If the license is granted, this becomes the value of the property at which it may later be acquired. It is important and relevant to prove then that the price actually paid was a legitimate price, that represented the fair market value at that time. Were it an inflated or fictitious value, it would not represent the legitimate original cost. Nor would it be an honest element of investment such as might be shown under the authority of the Powellson case, 118 Fed. (2d) 79.

Offer of proof No. 40 (Specification of Error 41) was as follows:

“Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that interest on the sum of the total legitimate investment of \$465,785.97 for a period of three years prior to December 9, 1939, at the rate of six per cent per annum, amounted to \$83,841.47; that the total net investment plus interest for a three-year period amounted to \$549,627.44.” (T. of R. p. 189)

and the argument made to the court in connection therewith is, we think, sufficient to present our position. It was:

“I might just say for Your Honor’s consideration that the theory on which we are interested on the second ground is that the rules and regulations of the Federal Power Commission under the Federal Power Act permits the capitalization of the cost during the three-year period prior to construction and during the period of construction, legitimate interest at the rate of six per cent to be capitalized on those projects, our theory being that

one of the elements that would enter into the determination of a buyer would be the fact that if he got his property and had to get his license he would be limited by the rules and regulations of the Federal Power Act as to the amount of money at which he could capitalize his purchase and that that element would be an element which the buyers would consider and would be an element entering into the fair market value of a piece of property where it wasn't subject to the restrictions as to capitalization and use that applies under the Federal Power Act. The general rule is that you can't add the interest as an element of the market value of your property in an ordinary building and that sort of thing, our theory being that if the value didn't change with the granting of the license that these facts are known and taken into consideration by the buyer and that we would be entitled to say what the minimum capitalized value that he could put in would be and that would enter into his thought as to what would be fair and what he could afford to pay." (T. of R. p. 190)

Offer of proof No. 60, Specification of Error No. 57, was an offer to prove by a witness familiar with the power situation in this territory that in his opinion the Kettle Falls site would have been devoted to power uses by 1939 or shortly thereafter if Grand Coulee had not been built. It was objected to as calling for a conclusion but any opinion of an expert is probably a conclusion. We think it is clearly permissible to prove by the opinion of experts the use to which property can or is likely to be devoted in the reasonably near future.

CONCLUSION

We respectfully submit, therefore, that the appellant, The Washington Water Power Company, was by the judgment of the trial court, deprived of its property without just compensation, in violation of the 5th Amendment, when the jury was not permitted to consider the effect upon the market value of the lands or the reasonable likelihood that the lands could and would be used for power purposes at the time of taking or within a reasonable time thereafter.

We respectfully submit, further, that the case should be reversed with directions to submit to a jury under proper instructions the question of the value of the property for all uses, including power site purposes.

Respectfully submitted,

ALAN G. PAINE,
H. E. T. HERMAN,
622 Spokane & Eastern Building,
Spokane, Washington,
Attorneys for Appellants.

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington,
Of Counsel.

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No. 10127

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**THE WASHINGTON WATER POWER COMPANY, A CORPORATION,
THE CITY BANK FARMERS TRUST COMPANY, A
CORPORATION, AND RALPH E. MORTON, AS TRUSTEE,
APPELLANTS AND CROSS-APPELLEES**

v.

**UNITED STATES OF AMERICA, APPELLEE AND CROSS-
APPELLANT**

**UPON APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON**

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

EDWARD M. CONNELLY,
*United States Attorney,
Eastern District of Washington.*

**VERNON L. WILKINSON,
DWIGHT D. DOTY,**
*Attorneys, Department of Justice,
Washington, D. C.*

B. E. STOUTEMYER,
*District Counsel, Bureau of Reclamation,
Of Counsel.*

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PAUL P. O'BRIEN,

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10127

THE WASHINGTON WATER POWER COMPANY, A CORPORATION,
THE CITY BANK FARMERS TRUST COMPANY, A
CORPORATION, AND RALPH E. MORTON, AS TRUSTEE,
APPELLANTS AND CROSS-APPELLEES

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-
APPELLANT

*UPON APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 116-132) holding evidence of power site value to be inadmissible is reported in 41 F. Supp. 119.

JURISDICTION

This is an appeal and cross-appeal from a judgment in condemnation entered March 14, 1942 (R. 294-306). Notice of appeal was filed by the condemnee on March 30, 1942 (R. 307), and notice of cross-appeal

by the United States on May 15, 1942 (R. 319-320). The jurisdiction of the district court was invoked by the United States under the Acts of August 1, 1888 (25 Stat. 357, 40 U. S. C. sec. 257), June 17, 1902 (32 Stat. 388), February 26, 1931 (46 Stat. 421, 40 U. S. C. sec. 258a), and August 30, 1935 (49 Stat. 1039). The jurisdiction of this Court rests on section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

STATUTE INVOLVED ON THE CROSS-APPEAL

Section 11265, Wash. Rev. Stat., Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

QUESTIONS PRESENTED

1. Whether the owner of riparian lands bordering on a navigable stream is entitled to recover compensation for their power site value when such lands are condemned by the United States for the improvement of navigation.

2. Whether the United States, when it condemns land after taxes have been levied and assessed but before a lien attaches as between a grantor and grantee,

is required to pay the amount of those taxes in addition to the agreed reasonable value of the land condemned.

STATEMENT

The United States on December 9, 1939, instituted condemnation proceedings (R. 2-20), accompanied by a declaration of taking (R. 20-31), to acquire from the Washington Water Power Company 330.31 acres of land riparian to the Columbia River at Kettle Falls, Washington—land which was to be flooded by the backwater from the Grand Coulee Dam, a multiple purpose structure designed (among other things) to control the floods, improve the navigability, and regulate the flow of the Columbia River (R. 96). Act of August 30, 1935, 49 Stat. 1028, 1039.

The facts are not in dispute and may be summarized as follows: The lands described in the condemnation petition and declaration of taking are part of a larger tract acquired by the Washington Water Power Company in 1921 at a cost of \$150,000 (R. 103, 119, 145). The lands are riparian to the Columbia River, a stream navigable “throughout its entire length in the United States” (R. 44). The condemned area includes 34.09 acres of upland on the right bank in Ferry County, 207.37 acres of upland on the left bank in Stevens County, and two intervening islands (88.85 acres) likewise in Stevens County (R. 31). These lands are so situated that, prior to the construction of the Grand Coulee Dam and the backing of the water 151 miles up the river to the Canadian border (R. 96), there could have been constructed, partly on the lands of the Washington Water Power Company and partly on

lands in the bed of the river, a hydroelectric power plant at an initial cost of approximately \$9,000,000 (R. 46, 120).

The parties stipulated, in advance of the trial, that the lands which are being condemned “have a reasonable value for agricultural, grazing, and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars (\$7,950.35)” (R. 45). At the trial the condemnee proffered evidence of the power site value of the lands in question. The Government objected to this evidence, contending (1) that under the rule laid down in *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, and followed in *Continental Land Co. v. United States*, 88 F. 2d 104, certiorari denied 302 U. S. 715, “a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein *as against the United States*¹ and is, therefore, barred from a recovery for any power site value of its riparian lands” (R. 117); and (2) that the condemnee’s proposed dam at Kettle Falls would have flooded 518 tracts of privately-owned land in 400 different ownerships (including lands owned by the United States and the State of Washington) and that there was no “reasonable probability that all the ownerships could be combined” (R. 117).

The trial court, after examining the record, briefs, and decision of this Court in the *Continental Land*

¹ Italics supplied throughout this brief unless otherwise noted.

Company case concluded that the evidence offered by the Washington Water Power Company was indistinguishable in principle from the evidence stricken in that case, and, accordingly, sustained the Government's objections (R. 116-132).

The taxing officials of Ferry and Stevens Counties, who had been made parties defendant because of their alleged tax liens against the property being condemned, raised one other issue during the trial. They introduced evidence as to taxes which had been levied (R. 66-70, 79-82) and assessed (R. 73-78, 83-85) in 1939 (payable in 1940), but which had not been discharged. The court decided that the counties could recover these taxes from the Government (R. 115-116).

No issues of fact remaining, the court accordingly directed the jury to return a verdict for the Washington Water Power Company in the amount agreed upon by the parties as the value of the property exclusive of its adaptability for power site purposes, and, in addition, to return tax verdicts for Stevens and Ferry Counties in the agreed sum of \$3,003.96 (R. 247-248). The Government excepted to the latter instructions and to the court's refusal to charge the jury that the taxes should be deducted from the stipulated value of the property (\$7,950.35). The Washington Water Power Company has appealed from the rulings as to power site value (R. 307), and the United States has filed a cross-appeal on the tax question (R. 319-320).

SPECIFICATION OF ERRORS RELIED UPON BY
CROSS-APPELLANT

The district court erred (R. 321-322):

1. In instructing the jury to bring in verdicts for Stevens County and Ferry County in amounts aggregating \$3,003.96, in addition to paying to the defendant Washington Water Power Company the stipulated reasonable value of the property taken, the instructions being as follows (R. 248):

* * * After the testimony was submitted we had a legal argument here as to the right of the counties to collect the taxes and on the question as to who should pay those taxes, whether they should be paid by the Government or by the defendant, The Washington Water Power Company. That was purely a question of law, and upon that question I decided that the counties were entitled to collect for the taxes for the year 1940, and furthermore decided that the Government would be compelled to pay for those taxes, and there is no question as to the amount, or no dispute as to the amount, and since your function would be to determine the amount and they have agreed upon the amount, I am therefore instructing the jury to return a verdict in favor of the defendant Stevens County in the agreed sum of \$1,950.76, and for the defendant Ferry County in the agreed sum of \$1,033.20, and I will allow the plaintiff an exception to the ruling and to the direction of the verdict in those amounts in each instance, and I will ask Mr. Calusen to sign the three verdicts on behalf of the jury.

2. In refusing to instruct the jury as follows (R. 282-283):

INSTRUCTION NO. 1

You are instructed, that the tax liens on lands taken by the United States in eminent domain proceedings do not increase the value of the land which the plaintiff is required to pay therefor.

INSTRUCTION NO. 2

You are instructed, that the total award or awards which should be made against the United States for the lands condemned in this action (other than Tract No. 2, the Hummel tract) should be the value of the land, that is, the sum of \$7,950.35.

INSTRUCTION NO. 3

You are instructed, that the amount of the tax liens awarded to the counties and required to be paid to them should be deducted from the stipulated value of \$7,950.35, in arriving at the amount which should be awarded to the defendant Washington Water Power Company for its interest in the lands condemned.

* * * *

[R. 249] The Court: * * * I will decline to give the instructions and allow you an exception. * * *

3. In holding that the United States should pay more than the fair market value of the property taken.

4. In holding that the United States should pay the Washington Water Power Company the stipulated

reasonable value of the property taken, \$7,950.35, without deducting therefrom the amount of the taxes required to be paid to Stevens County and Ferry County.

ARGUMENT

I

Appellant's lands could have, as against the United States, no inherent market value as a site for a dam across the Columbia River, a navigable waterway of the United States

Appellant contends that the adaptability of its lands at Kettle Falls for dam site purposes gave to the lands an extraordinary value for which the United States must pay compensation, and that the jury should have been permitted to consider this factor in determining the value of the property condemned (Br. 93, 99, 103, 128). The contention is untenable. Appellant's property could not have been utilized for dam site purposes except in conjunction with the bed and the flowing waters of the Columbia River. In other words, the lands were valuable for power purposes because of their riparian location and because of the attendant incidents of riparian ownership. But these riparian advantages, while valuable as between private claimants, are not property rights for which compensation must be paid by the United States when it elects to alter the flow of a navigable river. This is so because any riparian rights which attach to land bordering on a navigable stream exist only in servitude to the navigation powers of the federal Government. These principles are decisive of the case at bar.

A. *Appellant's property was valuable for power purposes only when utilized in conjunction with the flowing waters of the Columbia River.*—It is clear from the record in the instant case that the lands of the Washington Water Power Company could not have been utilized for power purposes except by the construction of a dam and the placing of other structures in and across the bed of the Columbia River and by making use of the flowing waters of that stream (R. 45). In other words, the property had potential power value because of its riparian character and the attendant incidents of riparian ownership. Whatever other advantages it may have possessed as a dam site were as nothing unless the property was used in conjunction with the flowing waters and the bed of the Columbia River.

B. *Riparian rights, though valuable as between private claimants, may be destroyed by a federal improvement of navigation without the Government being liable for compensation.*—It may be conceded that the location of appellant's lands along a great navigable river² and the attendant incidents of riparian ownership made the property exceptionally valuable for power purposes in transactions between private persons. See *Boom Co. v. Patterson*, 98 U. S. 403 (1878); *Ford & Son v. Little Falls Co.*, 280 U. S. 369 (1930); *Ford Hydro-Electric Co. v. Neely*, 13 F. 2d 361 (C. C. A.

² The parties have stipulated (R. 44), and this Court will take judicial notice of the fact (*Arizona v. California*, 283 U. S. 423), that the Columbia River is navigable from the Canadian border to the Pacific Ocean. *Continental Land Co. v. United States*, 88 F. 2d 104, 108 (C. C. A. 9, 1937), certiorari denied, 302 U. S. 715.

7, 1926), certiorari denied 273 U. S. 723; *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8, 1933), and similar cases cited by appellant (Br. 79-93). But, as the Supreme Court pointed out in *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 70 (1913), cases "which deal with the rights of riparian owners upon navigable or non-navigable streams *as between each other*" may be put to one side when the United States is involved. The Government does not stand in the position of an ordinary condemnor, when in aid of navigation it alters the flow of a navigable river and deprives the upland owner of riparian rights theretofore enjoyed. *W. A. Ross Const. Co. v. Yearsley*, 103 F. 2d 589, 593 (C. C. A. 8, 1939); *Great Northern Ry. Co. v. Washington Elec. Co.*, 197 Wash. 627, 640, 86 P. 2d 208, 214 (1939).

For example, the Government may deprive an upland parcel of the riparian right of access to navigable water (*Scranton v. Wheeler*, 179 U. S. 141, 151, 163; *Gibson v. United States*, 166 U. S. 269, 271, 275, 276); it may render the land nonriparian by diverting the river from its old channel to a new (*South Carolina v. Georgia*, 93 U. S. 4, 10, 11); and it may deprive such land of all benefits ordinarily derived from the flowing waters of a navigable stream (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, 72; *South Carolina v. Georgia*, 93 U. S. 4, 10, 11)—all without the payment of compensation.

This is so because any riparian rights which attach to lands bordering on a navigable stream exist only in servitude to the navigation powers of the federal

Government.³ Accordingly, when an improvement of navigation undertaken by the federal Government deprives an upland tract of its riparian rights, the owner is not entitled to recover compensation for the losses thus suffered; "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation." *Gibson v. United States*, 166 U. S. 269, 276 (1897); *Scranton v. Wheeler*, 179 U. S. 141, 157 (1900); *W. A. Ross Const. Co. v. Ycarsley*, 103 F. 2d 589, 592 (C. C. A. 8, 1939), affirmed on another point, 309 U. S. 18.⁴ The usual incidents of ri-

³ In Washington, which differs in this respect from the law generally prevailing elsewhere, an upland owner has no riparian rights even against the state, not to mention the United States. "So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water." *Port of Seattle v. Oregon & W. R. R.*, 255 U. S. 56, 64 (1921).

⁴ Appellant would brush these cases aside on the ground that they were actions for damages and that no actual "taking" had occurred (Br. 74-75, 99). This distinction is more illusory than real. In the so-called damage cases there is frequently an actual "taking." For example, when the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private owner is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject. *Scranton v. Wheeler*, 179 U. S. 141, 163 (1900); *South Carolina v. Georgia*, 93 U. S. 4, 11, 12 (1876); *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, 72 (1913); *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J. 1887), referred to with approval in *Scranton v. Wheeler*, *supra*, pp. 159-161; *Hawkins Point Light-House Case*, 39 Fed. 77, 83 (C. C. Md., 1889), referred to with approval in *United States v. Chandler-*

riparian ownership are subordinate to the public right of navigation, and though this qualified interest in the flowing waters of a navigable stream may be "helpful in protecting the owner against the acts of *third parties*, [it] is of no avail against the great and absolute power of *Congress* over the improvement of navigable rivers." *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62 (1913). One who purchases riparian land with the expectation of enjoying riparian benefits does so at the risk that all such rights may be injured or destroyed without compensation by a *federal* improvement of navigable capacity. Cf. *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 599 (1941). So long as the United States does not interfere, this is a risk worth taking. But it is a risk which is necessarily taken with the knowledge that the Government may at any time so alter the flow of the river as to render the land nonriparian.

C. *Power site value of lands bordering on a navigable stream exists only in servitude to the federal Government's navigation powers.*—The foregoing general principles are, it is believed, a complete answer to appellant's claim that the Government must pay com-

Dunbar Co., supra; Scranton v. Wheeler, 57 Fed. 803, 815 (C. C. A. 6, 1893), reversed upon joint motion of the parties, 163 U. S. 703, but quoted at length in 179 U. S. 141, 144-146 (1900). Similarly, the Government may deprive a tract of all riparian rights by so altering the flow of a navigable river as to render the land nonriparian. If this were done by a private person, it would constitute a "taking" of property protected by the federal Constitution. But if done by the United States, no liability exists, not because the case is one involving "damages" instead of a "taking," but because such property rights exist only in servitude to the federal Government's navigation powers.

compensation for the power site value of the property in question. "The flow of a navigable stream is in no sense private property * * *. Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion." *United States v. Appalachian Power Co.*, 311 U. S. 377, 424 (1940); *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 (1913). Or, as this Court has said, "riparian owners of shore lands along the banks of a navigable stream do not have *as against the United States*, any interest in or title to the waters which flow in the stream when the United States undertakes to develop it or to improve those water highways for the purpose of advancing and improving navigation." *Continental Land Co. v. United States*, 88 F. 2d 104, 108 (C. C. A. 9, 1937), certiorari denied, 302 U. S. 715. These cases, despite appellant's attempt at distinguishment (Br. 94-114), are precisely in point. The Supreme Court in the *Chandler-Dunbar* case held that, in view of the plenary power of the United States over navigation, there could be no property right, *as against the Government*, in navigable water and that a power company was not entitled to compensation for water power values when the United States condemned its dam. And, what is more pertinent to this case, the Court held that the claimant was not entitled to have considered, in determining the value of the upland bordering the river, the possible use of that land as a site for the development of hydro-electric power (229 U. S. at 76):

Having decided that the Chandler-Dunbar Company as riparian owners had no such vested

property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland.⁵

Similarly, in *United States ex rel. Tennessee Valley Authority v. Longmire* (E. D. Tenn., decided August 23, 1935), a three judge statutory court held that the owners of the site of the Norris Dam were not entitled to compensation for dam-site value. In its award the court expressly found that the Clinch River, on which the dam is located, "is a navigable stream * * * and that therefore the respondent landowners are en-

⁵ Appellant seems to find some comfort (Br. 108-114) in another portion of the opinion in the *Chandler-Dunbar* case holding that the power company was entitled to compensation based upon the availability of its upland for canal and lock purposes (p. 77). But that statement is not pertinent, since the building of the canals "around the stream" (p. 66), for watercraft to pass "around the falls and rapids in the river" (p. 67), did not require the erection of any structure in the river nor the utilization of any riparian rights impressed with a navigation servitude. The Supreme Court quite properly held that for those "portage" values the company was entitled to compensation. Nor is appellant helped by three other cases which it cites (Br. 75-76). The decision in *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893), is to be distinguished because in that case the Government actually took over the use and operation of structures which it had permitted the company to place in the river. The case of *United States v. Lynch*, 188 U. S. 445 (1903) has been overruled, and the decision in *United States v. Cress*, 243 U. S. 316, has been "limited to the facts there disclosed," namely, to changes in non-navigable streams where the United States has no navigation servitude. *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597-598 (1941).

titled only to just compensation for the value of the land taken by the petitioning condemnor *with no additional allowance for the value of the dam site located thereon.*"⁶

That a riparian owner is not entitled to compensation for the power site value of upland bordering on a navigable river, when taken by the United States in aid of navigation, would appear to have been conclusively decided in the *Continental Land* case. Appellant, in attempting to distinguish that case (Br. 94-108), fails to realize that there were two alternative grounds for the decision, a fact apparent from an analysis of the opinion. The Court first quotes with approval Judge Webster's statement that (88 F. 2d 108-109)—

* * * The decisions of the Supreme Court of the United States are to the effect that riparian owners of shore lands along the banks of a navigable stream do not have *as against the United States*, any interest in or title to the waters which flow in the stream when the United States undertakes to develop it or to improve those water highways for the purpose of advancing and improving navigation. That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power. * * *

⁶ The text of the court's "award" in that case is printed in full in the appendix.

These owners * * * are not entitled to have that adaptability of this site taken into account for the reason they have neither title to the bed of the stream nor any right to the waters which flow in it *as against the Government* exercising dominant power to improve the stream for navigation purposes, and that they are not entitled to that because it has not been taken from them, and it hasn't been taken from them for the simple reason that they never owned it in the first place.

The Court then observes that it "could well rest affirmance" upon the foregoing statement. But because of the magnitude of the project and the importance of the legal issues involved, the opinion proceeds to quote authorities in support of Judge Webster's statement that the Government may, in aid of navigation, deprive an upland owner of the incidents of riparian ownership without the payment of compensation (pp. 109-110). After demonstrating the soundness of the trial court's reason for excluding evidence of power site value, the Court then states an alternative ground for such exclusion (p. 110):

It may *also* be said that the lands had no inherent value for the purposes claimed by the appellants, unless in probable combination with other lands, for private use. There is no evidence that there was any reasonable probability of combination in a *reasonably near future*, [italics by the Court] or at all, of these lands for private use.

Hence appellant's effort to distinguish the *Continental Land* case is unavailing. Even conceding *argu-*

endo that appellant, "in the reasonably near future", could have acquired for its Kettle Falls project a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private (R. 54)—and that it could have acquired a permit from the Federal Power Commission, still its proffered evidence of power site value was rightly excluded for the reason given in the first portion of this Court's opinion in the *Continental Land* case.⁷

⁷ The decision of this Court in *Miller v. United States*, 125 F. 2d 75 (1942) affords still another reason for rejecting appellant's offer of proof, and is direct authority against appellant's contention (Br. 77-79, 90, 122-125) that the value of the dam site at Kettle Falls is to be neither enhanced nor depreciated by the fact that prior to the taking of the land in question the Grand Coulee Dam had been undertaken. In that case this Court held that the owner of property was entitled to any enhancement in value occurring between the time a project was commenced and particular property was taken—even though the enhancement was due to the project—on the theory that the value of property is to be determined as of the time of the taking. If this decision is sound, it would follow that the owner would have to suffer the depreciation in value which occurs in the interval after a project is begun and before land is taken. Applying that principle in this case, it is evident that appellant's dam site at Kettle Falls did not in fact have any power value at the time of the taking in December of 1939. With the definite authorization of the Columbia Basin Project by Act of Congress in 1935—four years before this condemnation suit was begun—the dam sites upstream ceased to have any value for power purposes. Every prospective purchaser knew that the site at Kettle Falls would be flooded by the backwater from the Grand Coulee Dam and that no head of water could be developed at that point for hydro-electric purposes. Inasmuch as the Government is contending in the Supreme Court that the *Miller* case was wrongly decided (No. 78, Oct. Term, 1942), the additional ground which that case affords for rejecting appellant's offer of proof is not pressed.

II

No separate judgments for unpaid taxes can be entered against the United States when it acquires property by condemnation

A. *In federal condemnation proceedings the United States pays "just compensation" and nothing more.*—When a tract of land in which various persons have separate interests or estates is taken for public use under the power of eminent domain, the compensation to be paid therefor should be determined as if the property were in a single ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *Carllock v. United States*, 53 F. 2d 926 (App. D. C. 1931); see *Pacific Nat'l Bank v. Bremerton Bridge Co.*, 2 Wash. 2d 52, 97 P. 2d 162 (1939); *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906 (1914). The compensation awarded is for the land itself and the value of the parts cannot exceed the value of the whole. *St. Louis v. Rossi*, 333 Mo. 1092, 64 S. W. 2d 600 (1933); *State v. Hall*, 325 Mo. 165, 28 S. W. 2d 80 (1930); *Detroit v. Fidelity Realty Co.*, 213 Mich. 448, 182 N. W. 140 (1921). See 2 Lewis, Eminent Domain (3d ed. 1909) 1253; 1 Nichols, Eminent Domain (2d ed. 1917) 707, 708; Orgel, Valuation under Eminent Domain (1936) sec. 107.

When the condemnor has paid into court the fair market value of the land (which, as said before, is

determined without reference to conflicting claims), it is entitled to have all claims paid out of the fund deposited. *United States v. Dunnington*, 146 U. S. 338 (1892); *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906 (1914). This rule has been applied in numerous cases holding that tax liens must be paid out of the award. *Cobo v. United States*, 94 F. 2d 351 (C. C. A. 6, 1938); *Coggeshall v. United States*, 95 F. 2d 987 (C. C. A. 4, 1938); *United States v. Certain Lands in the Town of Hempstead*, 31 F. Supp. 513 (E. D. N. Y. 1940); *Ross v. Kendall*, 183 Mo. 338, 81 S. W. 1107 (1904); *In re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549 (1901). See *Port of Seattle v. Yesler Estate*, 83 Wash. 166, 173, 145 Pac. 209 (1915). Cf. *St. Paul v. Certain Lands in St. Paul*, 48 F. 2d 805 (C. C. A. 8, 1931).

Taxes levied and assessed against property do not add to its value. If a tax lien or other encumbrance exceeds the value of the property, the Government can still acquire that property by paying "just compensation," whether that amount is sufficient to discharge all the encumbrances or not. Cf. *United States v. Greer Drainage Dist.*, 121 F. 2d 675 (C. C. A. 5, 1941). No state, by a tax lien statute or otherwise, can require the Government to pay more than the Constitution provides—just compensation. U. S. Constitution, Amendment V; *United States v. Indian Creek Marble Co.*, 40 F. Supp. 811, 818 (E. D. Tenn. 1941). In short, "the mortgagee or other lienor is entitled to be paid out of the fund, and the party acquiring the

land by condemnation proceedings is entitled to have such payment made out of the fund in exoneration of the land acquired. * * * the lien for taxes stands on the same ground as other liens." *In re Sleeper, supra*, p. 69.

In the instant case, the verdict of \$7,950.35 which the jury was directed to return in favor of the Washington Water Power Company represents the market value of the land (R. 45). In fact, there was no other evidence to support a different award. To require the Government to pay to Stevens and Ferry Counties an additional \$3,003.96 means that the Government, in order to acquire property by condemnation, must pay more than "just compensation."

B. *If a valid tax lien existed at the date of the taking, it must be discharged out of the condemnation award.*—It follows from the foregoing principles that, if the counties had a valid tax lien against the property on December 9, 1939, the date of the taking, then the taxes must be paid from the condemnation award of \$7,950.35 (R. 45, 247). Whether such a lien existed is a matter in which the Government is not directly concerned. Just compensation for the property taken having been paid into court, that money stands in lieu of the land. If a lien existed on December 9, 1939, the date of the taking, the counties are entitled to a share of that money. Otherwise, they are not. How the money is to be distributed is no concern of the condemnor; the Government's legal obligations are discharged when "just compensation" has been ascer-

tained and that sum has been paid into court. *United States v. Dunnington*, 146 U. S. 338 (1892).

C. *If no tax lien existed on the date of the taking, none can subsequently arise against the federal Government.*—Section 11265, Wash. Rev. Stat., Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

This statute makes it clear that a tax lien upon real estate does not, as between grantor and grantee, attach until February 15 of the year after the taxes are levied. The taxes in question were assessed and levied in 1939 (R. 66, 76, 79, 84). The Government took title to this property on December 9, 1939 (R. 33). Hence, if the United States is a “grantee” under that statute, no lien could have attached as against the Government until February 15, 1940. That a condemnor is a “grantee” under the foregoing statute has been expressly decided by the Supreme Court of Washington. *Bethany Presbyterian Church v. Seattle*, 154 Wash. 529, 282 Pac. 922 (1929); cf. *Commissioner of Internal Revenue v. Plestcheeff*, 100 F. 2d 62 (C. C. A. 9, 1938). That court’s construction of the state statute is, of course, binding on this Court.

Since no tax lien attaches against a condemnor until February 15 of the year following the levying and assessment of the tax, this means that no tax lien can ever arise against this property which the Government condemned and for which it has paid "just compensation", because lands belonging to the United States cannot be taxed by the state of Washington or its political subdivisions. Washington State Constitution, Art. 7, sec. 2; Washington Revised Statutes, Ann. (Remington, 1932), sec. 11111; *Van Brocklin v. Tennessee*, 117 U. S. 151, 179-180 (1886); *Clallam County v. United States*, 263 U. S. 341, 345 (1923); *Mullen Benevolent Corp. v. United States*, 290 U. S. 89, 94-95 (1933).

The case of *United States v. Alabama*, 313 U. S. 274 (1941) is no exception to this rule. There a statute of Alabama provided that when property became assessable the state would have a lien upon any property owned by a taxpayer for the payment of all taxes which might be assessed against him, which lien was to continue until such taxes were paid. The United States had acquired by purchase (not by condemnation) property within the tax year, but *after* the lien had attached. By the statute, subsequent purchasers took with notice of the existence of the lien. The Court held that the United States stood in the same position as any other purchaser. In the instant case, the Government took the property *before* the lien attached as against a "grantee". Because of its sovereign immunity from taxation, no tax lien or encumbrance can attach to property after title vests in the United States.

It is accordingly submitted that if the counties had a valid claim for taxes at the time title vested in the United States, the amount thereof should have been taken out of the sum agreed upon as the fair market value of the property. And if no tax lien existed on that date, none can subsequently attach against property held by the United States.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed insofar as it allows no compensation for power site value, and reversed insofar as it makes separate and additional awards to Stevens and Ferry Counties for 1940 taxes.

NORMAN M. LITTELL,
Assistant Attorney General.

EDWARD M. CONNELLY,
*United States Attorney,
Eastern District of Washington.*

VERNON L. WILKINSON,
DWIGHT D. DOTY,
*Attorneys, Department of Justice,
Washington, D. C.*

B. E. STOUTEMYER,
*District Counsel, Bureau of Reclamation,
Of Counsel.*

AUGUST 1942

APPENDIX

IN THE UNITED STATES DISTRICT COURT AT KNOXVILLE,
TENNESSEE

NO. 2799—AT LAW

UNITED STATES OF AMERICA EX REL TENNESSEE VALLEY
AUTHORITY

v.

SIOTHA LONGMIRE ET AL.

AWARD OF THE COURT

This cause came on to be heard, as provided by law, before three United States District Judges, the Honorables George C. Taylor, John J. Gore, and John D. Martin, upon the exceptions by both parties seasonably made to the award of the Commissioners herein, and the cause having been heard *de novo* upon the full transcript of the proceedings had before the Commissioners, and upon additional evidence adduced and upon argument of counsel for both parties, from all of which the court finds that the Clinch River is a navigable stream (a question not presented to the Commissioners) and that therefore the respondent landowners are entitled only to just compensation for the value of the land taken by the petitioning condemnor with no additional allowance for the value of the dam site located thereon.

Accordingly it is ordered and adjudged that the respondent landowners are awarded as just compensation for the land taken the sum of \$55,000.00, together with interest at six percent per annum on the excess

portion of said award over and above the amount heretofore paid into court from the date of the taking of said property by the petitioning condemnor, to wit, the 14th day of October 1933. In the determination of the award herein made, the court has considered that the costs are to be paid by the petitioning condemnor.

(Signed) GEORGE C. TAYLOR,
U. S. District Judge.
 JOHN J. GORE,
U. S. District Judge.
 JOHN D. MARTIN,
U. S. District Judge.

8/23/35

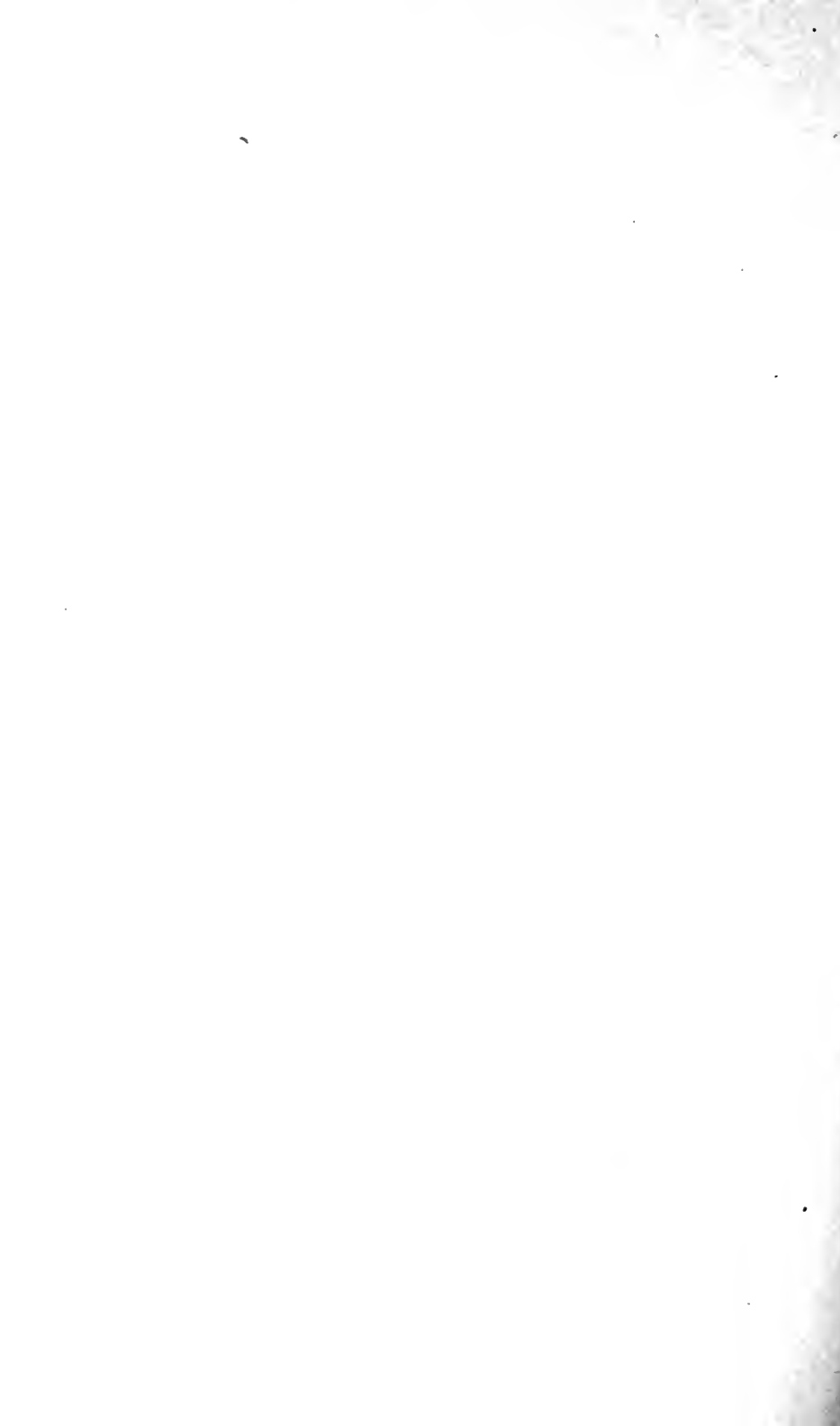
A true copy teste:

(Signed) LEE A. BEELER, *Clerk.*

By ROXIE BROGAN, *Dep. Clk.*

[SEAL]





IN THE

8

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

vs.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

Appellees.

REPLY AND ANSWER

BRIEF OF THE WASHINGTON WATER POWER COMPANY,
a corporation, THE CITY BANK FARMERS TRUST
COMPANY, a corporation, and RALPH E. MORTON, as
Trustee,

Appellants and Appellees.

ALAN G. PAINE,

H. E. T. HERMAN,

622 Spokane & Eastern Building,
Spokane, Washington.

*Attorneys for The Washington Water
Power Company, a corporation, The
City Bank Farmers Trust Company, a
corporation, and Ralph E. Morton, as
Trustee, Appellants and Appellees.*

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington
Of Counsel.

AUG 10 1942

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ARGUMENT IN REPLY TO THE GOVERN-
MENT'S ANSWER TO APPELLANT'S
APPEAL

In answer to our brief on appeal, the Government raises no objections to the form or sufficiency of our offers of proof nor disputes the facts which those offers were submitted to prove. The Government's position is based on three premises stated as follows in its brief:

A. Appellant's property was valuable for power purposes only when utilized in conjunction with the flowing waters of the Columbia River.

B. Riparian rights, though valuable as between private claimants, may be destroyed by a federal improvement of navigation without the Government being liable for compensation.

C. Power site value of lands bordering on a navigable stream exists only in servitude to the Federal Government's navigation powers.

As to the Government's premise A, there is no dispute. It was so stipulated at the trial.

As to the Government's premise B, there is no dispute, where the right is destroyed by governmental action in changing the characteristics of the river, etc., provided no actual land be taken.

Appellant cites the case of *U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667, but without any attempt to analyze it. We have discussed it in detail in our opening brief and

will not repeat that discussion here. The only cases not cited and discussed by us are *W. A. Ross Const. Co. vs. Yearsley*, 103 Fed. (2d), 589, (C.C.A. 8, 1939), *Great Northern Ry. Co., v. Washington Electric Co.*, 197 Wash. 627, 86 Pac. 2d 208, (1939).

W. A. Ross Const. Co. v. Yearsley, 103 Fed. (2d), 589, was not a condemnation suit but was a suit against a contractor for damages alleged to have resulted to plaintiff's land by washing away accretion land on the Missouri River as a result of the construction of dikes by the contractor for the United States in improvement of navigation on the Missouri. The court held such damages could not be recovered because they did not amount to a taking of property.

Great Northern Ry. Co. v. Washington Electric Co., 197 Wash. 627, 86 Pac. (2d) 208, was a dispute between a power company which had built a dam in the Columbia River under a Federal Power Commission license, and the railroad whose right of way embankment extended into the bed of the Columbia River. The court held that while the United States might not have to pay for damages to the railroad right of way, if it were improving navigation, since it was in the bed of the river, nevertheless its licensee, the Power Company, did under the terms of its license.

The fundamental error of the Government's position is in failing to distinguish between the actual taking of property and the impairment of riparian rights or values, which involve no taking of property. It is settled law that the Government may improve navigation on a navigable stream, even to the extent of

changing the course of the stream so that it actually no longer flows by the land it formerly did, without being responsible for damages. (*Scranton vs. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48; and other cases cited in pages 74 and 75 of our opening brief, and in Note 4 of the United States of America's brief, on page 11.)

However, none of these cases involve the taking of uplands—but the most that can be said for these cases is that some involved structures actually in the bed of the navigable waters such as an oyster bed (*Lewis Bluepoint Cultivation Co. vs. Briggs*, 229 U. S. 82; 57 L. ed. 1083; 33 S. Ct. 679; Ann. case 1915, A. 232), or a railroad road bed (*U. S. vs. C. M. & St. P. Ry. Co.*, 312 U. S. 592, 85 L. ed. 1064, 61 S. Ct. 772). In those cases, the owner's structure was rendered valueless or he was required to remove it, but in cases where the government actually took property, the courts have compelled the United States to pay for it. See *Monongahela Navigation Co. vs. United States*, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622.

In all the cases cited, where the actual taking of land was involved, the Government has had to pay the fair market value, and no more,—(*The Continental Land Co. case*, 88 Fed. (2d) 104, and the *Chandler-Dunbar case*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667 are examples),—but in no case cited has the United States paid less than the fair market value, because the taker was the Government and was going to use the land for some purpose connected with the improvement of navigation.

Let us examine the question of uplands, bordering navigable waters. Such lands may not be suited for power purposes but their value is often increased by their proximity to the water, maybe as a summer resort, or a home site, a canal site, or even a farm which is more desirable because it borders a river as compared with one of identical soil characteristics that does not. Such values may lawfully be diminished by changes in the river bed itself when the United States improves navigation, but *if the land is condemned*, the value is recognized.

Again we point out the treatment of this value in *U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667, in that portion of the opinion dealing with canal site value. The appellee's brief deals with this only in a foot-note on page 14, when it says:

"Appellant seems to find some comfort (Br. 108-114) in another portion of the opinion in the Chandler-Dunbar case holding that the power company was entitled to compensation based upon the availability of its upland for canal and lock purposes (p. 77). But that statement is not pertinent, since the building of the canals 'around the stream' (p. 66), for watercraft to pass 'around the falls and rapids in the river' (p. 67), did not require the erection of any structure in the river nor the utilization of any riparian rights impressed with a navigation servitude. The Supreme Court quite properly held that for those 'portage' values the company was entitled to compensation."

It is to be noted that "portage value" is a phrase of appellee's coinage. It does not appear in the opin-

ion. How, again we ask, can land be used for a canal without the diversion of the waters of the navigable stream thru the canal? If the owner can divert some water in order to pass ships "around the falls and rapids of the river," how much can he divert? Such lock sites might lawfully be rendered valueless by the Government forbidding such use of the water or by the erection of dikes or walls or other structures in the bed of the river, that would make such diversion impossible, but when the land itself is appropriated the 5th Amendment says that compensation for such value must be made. (*U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667; *Monongahela Nav. Co. vs. U. S.*, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622). Appellee fails entirely to comment on the case of *Olson vs. U. S.* 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704 discussed at length in our brief on pages 87 to 91 inclusive. This case involved the navigable body of water known as the Lake of the Woods. The Government was raising the level of the lake in conjunction with the Canadian Government. The land owners sought additional values for their land for reservoir purposes. This was disallowed not on the ground that the improvement was one in aid of navigation but on the ground that there was no reasonable likelihood of the creation of a reservoir by anyone but the Government, and that the land had no increased market value; i. e., increased value between private parties. However, increased values were allowed because of the value of the lands as fishing resorts, summer resorts, docking places for boats, etc.,—all of which values were dependent upon the use of

the waters of the Lake of the Woods in conjunction with the lands.

“The court suggested that petitioner Olson’s lands might be used for fishing purposes and instructed the jury, if it so found, to ‘add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station.’” (*Olson vs. U. S.* 292 U. S. 254, 78 L. ed. 1244).

While it may seem inequitable, we think it correct to say that the Government might have drained the Lake of the Woods, or greatly lowered its level, and destroyed these values, without the necessity of paying for them, because there would be no “taking” of the land within the meaning of that word as used in the Constitution.

In cases where the government was sued for damages to property adjacent to streams or other bodies of water resulting consequentially from its exercise of the power to improve navigation, the courts have held there was no liability for such incidental damages occurring to lands adjacent to the bodies of water altered in aid of navigation, because the government was engaged in a lawful undertaking. In all cases where the government condemned lands it has been required to pay for all property actually taken, on the same basis as any other purchaser.

When consequential damage occurred to adjacent property incidental to the improvement of the bodies of water such consequential damage occurred as the result of the Federal Government exercising a right expressly conferred by the commerce clause of the

Constitution and such damage was in fact a form of *damnum absque injuria*. On the other hand the taking of property by the government in a condemnation proceeding can only be accomplished subject to the limitations placed upon the Sovereign by the last clause of the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use without just compensation."

In this connection it is well to bear in mind the words of Mr. Justice Black speaking for the Supreme Court of the United States: "The Constitutional prohibition against uncompensated taking of private property for public use is founded upon a conception of the injustice in favoring the public as against an individual property owner." *U. S. vs. Spontenbarger*, 308 U. S. 266, 84 L. ed. 238, 60 S. Ct. 225.

The crux of this whole case is reached in the Appellee's Point C—"Power site value of lands bordering on a navigable stream exists only in servitude to the Federal Government's navigation powers." This statement in itself is misleading. It is true, as we have said, that these values might be destroyed by dredging the channel of the river, for instance, when the lands themselves were not taken, and the consequential damage would be *damnum absque injuria*,—but the proposition as stated by Counsel for the United States is too broad if it is meant that the Government can condemn these lands and ignore their fair market value. Here, again, the only case relied upon to sustain the Government's contention, besides the Chandler-Dunbar case and the Continental Land Co.

case, is the unreported case of *U. S. A. ex rel. Tennessee Valley Authority vs. Longmire*, printed in the Appendix. It is impossible to tell from this opinion what the facts were. Apparently a substantial sum (\$55,000) was allowed for a dam site. So far as can be determined from the opinion \$55,000.00 was all that the market value justified, and any additional sum sought was merely a "hypothetical additional value" as discussed in the Chandler-Dunbar case *supra* or "inherent adaptability" (Continental Land case).

In citing *Miller vs. U. S.*, 125 Fed. (2d) 75, we feel sure the attorney writing the Government's brief had his tongue in his cheek. In the first place, he admits he believes the case is wrongly decided and is now in the Supreme Court with the Government seeking its reversal, but passing this, the argument he seeks to draw from this case is on its face unsound. The Government's brief says (page 17):

"Applying that principle in this case, it is evident that appellant's dam site at Kettle Falls did not in fact have any power value at the time of the taking in December of 1939. With the definite authorization of the Columbia Basin Project by Act of Congress in 1935—four years before this condemnation suit was begun—the dam sites upstream ceased to have any value for power purposes."

This applies equally to all land in the reservoir. What about the Town of Kettle Falls, the farms, the mill sites? Did not every purchaser know that crops could no longer be grown on the farms, that buildings and businesses could not be maintained in a town 50 feet under water? Who would buy a saw mill that in

a few months would be under 100 feet of water? Surely we have not reached the day when the Government is asking its courts to declare that the United States can announce that it is going to condemn privately owned property, and then say that since all purchasers must know they cannot use that property except in the brief interval until condemnation is started, that therefore there will be no purchasers, and the property has lost its market value.

But further analysis of the Miller case shows it is not susceptible to any such perversion. The question involved was the value of land to be used for the relocation of the Southern Pacific Railroad, necessitated by the flooding of the old right of way by the Shasta Project. The land involved was not an essential part of the Shasta Project, as there were several alternative routes for the railroad. The court held that the route was not definitely determined until the condemnation suit was commenced, and that the value of the land should be determined as of that date, and sales of similar land could be shown. Similar land was land adjacent to the right of way and had had some increase in market value due to general rise in property values brought about by the building of the Shasta Project. Of course, as pointed out in the opinion, when the project boundaries are definitely fixed, the land ceases to be "similar land" to land outside of but adjacent to the project, and sales of such outside land made after the announcement of the project are no criteria of the value of the project land.

In conclusion, after reading the appellee's brief,

the question seems to have narrowed itself down to this—conceding that the Government in the exercise of its commerce power, can improve navigable waters in such way as to injure riparian rights without compensation, can it when it exercises the right of eminent domain take property without paying for it the price the owner could get for it if he were to sell it on the market? The answer, it seems to us, is clearly “No.” We know no better statement of this than that of the Supreme Court in *Olson vs. United States*, 292 U. S. 246, 255, as follows:

“Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, *but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.*” (Emphasis supplied).

It will be noted that it is the “market value while the property is privately held” which must be considered in determining just compensation. When, therefore, the Government concedes this land had a higher market value than the court allowed, while the property was privately held, we respectfully submit we were denied just compensation when the jury was not allowed to consider that value.

ANSWER TO ARGUMENT OF UNITED STATES OF AMERICA IN SUPPORT OF ITS APPEAL

The statute of the State of Washington provides that as between grantor and grantee taxes shall not become a lien upon real estate until the fifteenth day of February of the year succeeding the year in which they are levied.

The government took possession of and title to the property on December 9th, 1939. As between the grantor and grantee, the taxes levied in 1939 did not become a lien until February 15th, 1940. The Supreme Court of Washington has held that when real estate is condemned, that the condemnee is a grantor within the meaning of the above mentioned statute, and that taxes levied for the year in which property is acquired cannot be paid out of the award since as between grantor and grantee there is no lien upon the property for taxes levied during the year in which the property is taken. *Bethany Presbyterian Church v. City of Seattle*, 154 Wash. 529, 282 Pac. 922.

The Supreme Court of the United States had held that the Federal Constitution does not prohibit states from fixing the time when a tax lien attaches to real property. *United States v. Alabama*, 313 U. S. 274, 85 L. ed. 1327, 61 S. Ct. 1011.

The pertinent parts of Remington's Revised Statutes of Washington, Sec. 11243 (Laws of 1935, p. 68, Sec. 1) are as follows:

“On the first Monday in January next succeeding the date of levy of taxes the County Auditor shall deliver to the County Treasurer the tax rolls of his county for such assessment year, with

his warrant thereto attached. . . . The amount of said taxes levied and extended upon said rolls shall be charged to the Treasurer in an account to be designated as Treasurer's 'Tax Roll Account' for and said rolls with the warrants for collection shall be full and sufficient authority for the County Treasurer to receive and collect all taxes therein levied: Provided, That the County Treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following." (For entire section see Appendix p. 19).

Remington's Revised Statutes of Washington, Sec. 11265 provides:

"The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year." . . . (For entire section see Appendix p. 19).

The Supreme Court of the State of Washington construed the earlier form of that section of the statute last above quoted and in force at the time of the taking of the property in question. The form of the statute when it was construed by the Supreme Court of the State of Washington in *Bethany Presbyterian Church v. City of Seattle*, 154 Wash. 529, 282 Pac. 922, differed from its present form only in that the dates therein set forth are different from the time fixed for the commencement of the lien than are those in the above cited section of the statute which was in effect at the time that property was taken.

In the course of the decision construing the statute, the Supreme Court of Washington said:

“On January 14, 1929, the six months’ statutory period, within which the city had the privilege of electing whether it would pay the eminent domain award and take the land or abandon its right to do so, having expired, and the city having failed to expressly so elect, which failure had the effect, in law, of constituting an election by the city to pay the award and take the land (Rem. Comp. Stat., Sec. 9274), the church demanded payment from the city of the full amount of the award. Thereupon a controversy arose between the church, the city and the county as to whether or not the general taxes upon the land levied for the year 1928, amounting to \$343.63, should be first paid to the county out of the total award and only the balance thereof paid to the church. * * *

“ * * * We conclude that title to the land passed from the church to the city on January 16, 1929.

“When did the taxes for the year 1928 become a lien upon the land as between the church and the city, viewing them as grantor and grantee? In chapter 130, Laws of 1925, Ex. Ses., p. 293 (Rem. 1927 Sup., Sec. 11097-104) relating to assessment, levy, collection and lien of general taxes, we read:

“‘Sec. 104. The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year.’

“This quotation is a reenacted provision of our previously existing statutes. Thus, it becomes plain that, viewing the church and the city as grantor and grantee, title to the land passed from the church to the city on January 16, 1929, without any obligation on the part of the church to

the city to assume or pay the taxes levied upon the land for the year 1928.

“Does the law regard the church and the city as conventional grantor and grantee, as if a voluntary conveyance had been made by the church to the city instead of title to the land passing by virtue of the eminent domain proceeding and payment of the award as therein adjudicated? Our recent decision in *American Creameries Co. v. Armour & Co.*, 149 Wash., 690, 271 Pac. 896, and the authorities therein noticed, we think, are decisive in favor of the church upon this question; that is, that the title passed from the church to the city in legal effect, as from grantor to grantee.
* * *

“Did the judgment in the eminent domain proceeding rendered July 5, 1928, award to the county, for the 1928 taxes, any portion of the \$9,427.50 awarded for the taking of the land? There is nothing in the record before us so indicating. Indeed, so far as the record here advises us, it does not appear that the county was a party to the eminent domain proceeding in the superior court, or that it asserted any right to any portion of the award until it joined with the city in asking payment to it of the \$343.63 in the hands of the clerk of the court. We cannot presume that the judgment award rendered July 5, 1928, adjudicated the right in the county to participate in the award to the extent of the amount of the general taxes against the land for the year 1928, to become payable more than six months thereafter, on the first Monday in February, 1929. Indeed, we think it would have been error, prejudicial to the rights of the church, to have so adjudicated in the judgment making the award, for, as we have seen, the church had the right to an award for the city's taking of the land, undiminished by the taxes of 1928, which, as between it as grantor and the city as grantee, would not become a lien upon the land until more than six months thereafter, on the second Monday of February, 1929.”

Cited with approval in *State ex rel. Oregon-Washington Water Service Co. et al, v. Hoquiam*, 155 Wash. 678, 287 Pac. 670.

That there is no inhibition contained in the United State Constitution which prohibits any state of the Union from fixing the time and conditions under which a lien for taxes shall attach to real property is expressly held in the case of *United States v. Alabama*, 313 U. S. 274, 85 L. ed. 1327, 61 S. Ct. 1011, wherein the court used the following language:

“There is no question however, as the Government concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. ‘It follows the lands in the hands of the vendee, all persons being chargeable with a knowledge of its existence.’ *Driggers v. Cassady*, 71 Ala. 529, 534. See, also, *Swann v. State*, 77 Ala. 545; *State v. Alabama Educational Foundation*, 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme.

* * * ”

“The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and

making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. * * * .”

The Supreme Court of the United States in *Magruder v. Supplee*, decided May 25, 1942, 86 Law Edition Advance Opinions No. 15, p. 1025, speaking with reference to the deductability of taxes by an income tax payer said:

“Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed.”

Applying the rules announced in these cases to the instant facts we find this. The 1939 taxes in the sum of \$3,003.96 became a lien on the land on January 1, 1939. On December 9, 1939, the United States acquired title in fee simple absolute (T. of R. p. 21) by filing a declaration of taking, setting forth the nature of the estate taken and depositing the estimated value of the property in court (Title 40, U.S.C.A., Sec. 258a). The Government deposited the sum of \$7,950.35 for the tract involved here. The Government and The Washington Water Power Company then stipulated as follows:

“It is Hereby Stipulated by and between the plaintiff and the defendant, The Washington Water Power Company, for the purposes of this case only:

* * * * *

“5. That the lands of the defendant, The Washington Water Power Company, being condemned in this proceeding, have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and $35/100$ Dollars (\$7,950.35).

“6. That should the Court hold that evidence of power site values is inadmissible then it is stipulated and agreed that what severance damages, if any, the said defendant, The Washington Water Power Company, has suffered to the remainder or unappropriated portion of its holdings are included in the sum of Seven Thousand Nine Hundred Fifty and $35/100$ Dollars (\$7,950.35) *and the award to the defendant should be the said sum of Seven Thousand Nine Hundred Fifty and $35/100$ Dollars (\$7,950.35). * * **” (T. of R. pp. 43, 45, 46).

Since under the Bethany Church case, The Washington Water Power Company was a grantor on December 9, 1939, against whom no lien had accrued, it was entitled to the full agricultural and stipulated value, \$7,950.35. As to the taxes which were a lien against the property, the Government could have elected to take an imperfect title, as in the Alabama case, and the Counties could not have enforced their lien, or it could take a fee simple title and make the Counties parties to the condemnation suit, which it did. In this latter event, it obligated itself to pay the tax lien just as any other grantee seeking to obtain a fee simple title on December 9, 1939, for in no other way could the fee simple title pass.

CONCLUSION

We respectfully urge, therefore, that this case should be reversed on the appeal of The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, with instructions to submit to a jury the question of power site value, and should be affirmed on the Government's appeal.

Respectfully submitted,

ALAN G. PAINE,

H. E. T. HERMAN,

Attorneys for The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee, Appellants and Appellees.

POST, RUSSELL, DAVIS & PAINE,
Spokane, Washington,
Of Counsel.

APPENDIX

Remington's Revised Statutes of Washington, Sec. 11243:

Rolls Delivered to Treasurer — Charged With Amount—On the first Monday in January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for of said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: *Provided*, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following. (L. '35, p. 68, Sec. 1).

Remington's Revised Statutes of Washington, Sec. 11265:

Life of Lien—Between Grantor and Grantee—Lien of Personalty Tax—Following Property—Personalty Lien on Realty—The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are

levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which the same is listed with and valued by the County Assessor, and no sale or transfer of such personal property shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, distrained by the Treasurer as provided in section 86 of this act, from and after the date of the distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the County Treasurer and designated and charged upon the tax rolls as provided in section 112 of this act, from and after the date of such selection and charge and no sale or transfer of such real property so selected and charged shall in any way affect the lien for such personal property taxes upon such property. (L. '39, ch. 206, Sec. 45, p. 766, amending L. '35, Ch. 30, Sec. 7).

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

vs.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

Appellees.

Upon appeal and cross-appeal from the District Court
of the United States for the Eastern District of
Washington.

ANSWER BRIEF OF FERRY COUNTY, WASHINGTON and
STEVENS COUNTY, WASHINGTON, to cross-appeal of
UNITED STATES OF AMERICA.

OSEE W. NOBLE,

Attorney for Appellee,

Ferry County, Washington

Address: Republic, Washington.

F. LEO GRINSTEAD,

Attorney for Appellee,

Stevens County, Washington

Address: Colville, Washington.

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No. 10,127

IN THE
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THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

vs.

Appellants,

UNITED STATES OF AMERICA,

And

Appellee.

UNITED STATES OF AMERICA,

vs.

Appellant,

THE WASHINGTON WATER POWER COMPANY, a corporation,
THE CITY BANK FARMERS TRUST COMPANY, a corporation,
and RALPH E. MORTON, as Trustee,

Appellees.

Upon appeal and cross-appeal from the District Court
of the United States for the Eastern District of
Washington.

ANSWER BRIEF OF FERRY COUNTY, WASHINGTON and
STEVENS COUNTY, WASHINGTON, to cross-appeal of
UNITED STATES OF AMERICA.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

The United States of America instituted suit to condemn uplands of Ferry and Stevens County, Washington, belonging to appellee, the Washington Water Power Company. A petition for condemnation was served upon the appellants and upon appellees, Stevens County, Washington, and Ferry County, Washington, among others, and filed with the clerk of the United States District Court for the Eastern District of Washington Northern Division. This petition for condemnation is set forth on Pages 2 to 20 of the Transcript of the Record. The statutory provision which sustains the jurisdiction of the District Court is Section 257, Title 40, U. S. C. (August 1, 1888, c. 728, Sec. 1, 25 Stat. 357).

The statutory provision which sustains the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 128, 36 Stat. 1133; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 7, 1925, c. 150, 43 Stat. 813; February 13, 1925, c. 229, Sec. 1, 43 Stat. 936) and Section 230, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 11, 26 Stat. 829; February 13, 1925, c. 229, Sec. 8 (c), 43 Stat. 940) together with Rules of Civil Procedure, Rule 73 and Rule 81 (a) (7).

Possession of and title to the said uplands was obtained by the United States Government by a judgment of taking (T. of R. p. 33) entered upon a dec-

laration of taking (T. of R. p. 20). Final judgment was entered by the District Court on the 14th day of March, 1942 (T. of R. p. 294). Notice of appeal and bond were filed by appellant March 30, 1942 (T. of R. p. 307).

Notice of cross-appeal was filed by the United States of America May 15, 1942 (T. of R. p. 319-320).

SUMMARY OF ARGUMENT

The Government took possession of and title to the property involved on December 9, 1939. Taxes for 1939 had been levied on the land prior to this date. The law of the State of Washington provides that taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. This latter provision fixes the respective rights of the grantor and grantee and protects the grantor on his warranty as against a suit for unpaid taxes.

The Supreme Court of the United States has held that the Federal Constitution does not prohibit states from fixing the time when a tax lien attaches to real property.

Stevens and Ferry Counties were brought into this action as parties defendant for the purpose of having their respective interests in the land adjudicated and a just compensation paid therefor.

ARGUMENT

The following are the material parts of Remington's Revised Statutes of Washington pertinent to this appeal:

Section 11238: "For the purpose of raising revenue for state, county and other taxing district pur-

poses, the board of County Commissioners of each county at its October session, and all other officials or boards authorized by law to levy taxes for taxing district purposes, shall levy taxes on all the taxable property in the county or district, as the case may be, sufficient for such purposes;—.”

Section 11239: “It shall be the duty of the board of county commissioners of each county, on or before the second Monday in October in each year, to certify to the county assessor of the county the amount of taxes levied upon the property in the county for county purposes, and the respective (respective) amounts of taxes levied by the board for each taxing district, within or coextensive with the county, for district purposes, and it shall be the duty of city councils of cities of the first class having a population of three hundred thousand or more, and of city councils of cities of the fourth class, or towns, and of all officials or boards of taxing districts within or coextensive with the county, authorized by law to levy directly and not through the board of county commissioners, on or before the second Monday in October in each year, to certify to the county assessor of the county the amount of taxes levied upon the property within the city or district for city or district purposes.”

Section 11240: “The county assessor shall deliver said tax-rolls to the county auditor on or before the fifteenth day of December, taking his receipt therefor.”

Section 11243: (As amended by c. 30, p. 68, sec. 1, Session Laws of 1935). “On the first Monday in

January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for..... and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following."

Section 11265: (As amended by c. 206, sec. 45, p. 766, Session Laws of 1939). "The taxes assessed upon real property shall be a lien thereon from and including the first day of January, in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. . . . "

The taxes on the land taken were levied on October 1939. The United States acquired title to the land on December 9, 1939, and at that time it was unlawful for the County Treasurers of Ferry and Stevens Counties to collect the taxes which had been levied in

1939, or to issue receipts for the same, or to enter payment or satisfaction thereof upon the assessment rolls. The money that must be paid by the United States for lands taken as authorized by U. S. C. Title 40, sec. 258A is just compensation at the time of taking, and not just compensation at some future date when as between grantor and grantee the State, County or other third party may acquire a lien against the property after it has been acquired by the United States.

In *People's Gas and Water Co. v. City of Vancouver*, 106 F. (2d) 909, this Court stated:

“With respect to real property, the owner of the title thereto at the time the lien attaches is liable for the taxes. *State v. Snohomish County*, 71 Wash. 320, 128 P. 667; *Bethany Presbyterian Church v. City of Seattle*, 154 Wash. 529, 282 P. 922; *State ex rel. Oregon-Washington Water Service Co. v. City of Hoquiam*, 155 Wash. 678, 286 P. 286, 287, 670.”

The two cases last cited in the above quotation from this Court's decision involved constructions by the Supreme Court of Washington of the following portion of a statute:

“The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the first Monday in February of the succeeding year. . . .” (Rem. 1927 Sup. Sec. 11097-104).

It is conceded on page 21 of Cross-Appellant's Brief that under section 11265, Remington's Revised Statutes

of Washington as construed in the case of *Bethany Presbyterian Church v. City of Seattle*, 154 Wash. 529, 282 P. 922, that a condemnor is a grantee. The same statute providing that as between the grantor and grantee the tax lien does not become effective until February 15th of the following year does no more than to determine the rights and liabilities of the respective parties as to payment of the tax which at all times during the year has been a lien on the land and protects the grantor from a suit on his warranty for unpaid taxes. The lien attached to the land on January 1, 1939, and it remained a lien at all times until paid, not collectible it is true, from either grantor, grantee or from any other person, as the laws of the State of Washington (Rem. Rev. Stat. of Wash. Sec. 11243) forbids payment to, or the collection of taxes by the county treasurer prior to February 15 of the year following assessment and levy. The taxes were actually levied two months before the United States became the owner of the land.

Of this lien all parties dealing with the land were bound to take notice in the same manner and to the same extent as of any other lien or incumbrance of record. If the construction of the statute by Cross-Appellant is a correct one then the lien imposed for taxes on real property from the first day of January in the year in which they are levied until the same are paid would be extinguished by a sale of the land at any time during the year, to be revived on the 15th day of February following. Such a construction is wholly at variance with the plain provisions of the

statute. The lien is upon the land and remains as a valid and existing charge against the land of the amount of the taxes levied until they are paid. (Rem. Rev. Stat. 11265). The owner of the land on the 15th day of February of the year following (the tax paying date) is charged with their payment.

In the case of the *United States v. Alabama*, 313 U. S. 274, the tax law of Alabama provides that at the time when property becomes assessable the state has a lien upon any property owned by a taxpayer for the payment of the taxes assessed against him, which lien continues until such taxes are paid. The United States acquired the property within the tax year but after the lien had attached. Under the statute a subsequent purchaser took with notice of the existence of the lien. The Court held that the United States in acquiring the property was in the same position as any other purchaser. In the State of Washington, the tax lien attaches on the first day of January of the tax year, and the taxes involved in the instant case having been levied in October, 1939, and the United States not having acquired the property until December 9th of the same year, it took with notice under the rule laid down in the Alabama case.

This is not a tax levied nor a lien attached after the United States became the owner of the property as Cross-Appellant seems to contend. As has been pointed out, the lien attached on the first day of the tax year and the tax was actually levied prior to the time the United States became the owner on December

9, 1939. Any grantee would be bound to take notice of the existence of the lien for under the plain provisions of the statute the grantor would be released from its obligation. Payment of the tax thereafter by the grantee would not be the payment of a part of a just compensation for the land taken, but a duty and obligation placed upon him by statute if he remained the owner on February 15 following. In support of this contention, we call the attention of the Court to the case of *Magruder v. Supplee*, decided by the Supreme Court of the United States on May 25, 1942, and reported in Vol. 86 Law Edition Advance Opinions No. 15, p. 1025, wherein the Court speaking with reference to the deduction of taxes by an income taxpayer says:

“Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed. *Walsh-McGuire Co. v. Commissioner of Internal Revenue* (CCA 6th) 97 F (2d) 983, 984; cf. *Helvering v. Fuller*, 310 U. S. 69, 74, 75, 84 L. ed. 1082, 1084, 1085, 60 S. Ct. 784; and see Paul, op. cit., supra, pp. 23, 24.

“To illustrate concretely the workings of the Maryland tax system with respect to respondents’ purchases the property bought on May 10, 1936, may be taken as typical of all the other transactions. The assessment date, or ‘date of finality,’ for both state and city taxes was October 1, 1935. These taxes were for the calendar year 1936 and became due and payable on January 1, 1936, although the default date for city taxes was not until July 1, 1936, and for state taxes January 1, 1937. Both the state and the city had liens against the property from the due date, January 1, 1936. And, respondents’ vendor became per-

sonally liable for these taxes before the sale. An action of assumpsit could have been brought against him for the taxes at any time after the due date. Had he sold the property between October 1, 1935, and January 1, 1936, he apparently would still have remained personally liable, and if he had gone into bankruptcy after such sale the taxing authorities would have had a provable claim against him. *Re Wells* (DC) 4 F. Supp. 329, 23 Am. Bankr. Rep. (NS) 615; cf. *Baltimore v. Perrin*, 178 Md. 101, 107, 12 A (2d) 261.

“It is thus apparent that tax liens had attached against the properties and that respondents’ predecessors in title had become personally liable for the taxes prior to any of the purchases. The attachment of a lien for taxes against property before its sale has been held to prohibit the vendee from deducting as ‘taxes paid,’ amounts paid by him to discharge this liability. *Lifson v. Commissioner of Internal Revenue* (CCA 8th) 98 F. (2d) 508; *Walsh-McGuire Co. v. Commissioner of Internal Revenue* (CCA 6th) 97 F. (2d) 983; *Merchants Bank Bldg. Co. v. Helvering* (CCA 8th) 84 F. (2d) 478; *Helvering v. Missouri State L. Ins. Co.* (CCA 8th) 78 F. (2d) 778, 781. A tax lien is an encumbrance upon the land, and payment, subsequent to purchase, to discharge a pre-existing lien is no more the payment of a tax in any proper sense of the word than is a payment to discharge any other encumbrance, for instance a mortgage. It is true that respondents here could not have retained the properties unless the taxes were paid, but it is also true that they could not retain them without paying the purchase price. It is no answer therefore to say that the property was burdened with the taxes and that respondents became obligated to pay them. There was a burden, but it was contractually assumed. In discharging this assumed obligation respondents were not paying taxes imposed upon them within the meaning of Sec. 23 (c). For ‘only the

person owning the property at that time (i. e., when the tax lien attaches) is subjected to the burden which the law imposes; and only the person who has been thus subjected to the burden of the tax is entitled to a deduction for paying it. Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, but is actually as well as theoretically a payment of purchase price; for, after the lien attaches and the taxing authority becomes pro tanto an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title.' Judge Parker, dissenting in *Commissioner of Internal Revenue v. Rust* (CCA 2d) 116 F. (2d) 636, 641."

Applying this reasoning to the case at bar, if The Washington Water Power Company had negotiated a sale to the United States on December 9, 1939, it could not have paid the taxes and deducted them on its income tax as taxes paid, because they were not taxes it was obligated to pay. The Company would have been entitled to the market price without consideration for the 1939 taxes, and the Government, like any other purchaser who desired an unencumbered title, would have to pay the taxes, since they were then a lien on the land.

That there is nothing contained within the United States Constitution which prohibits any state from fixing the time and conditions under which a lien for taxes should attach to real property is expressly held in the case of *United States vs. Alabama* ante wherein the Court speaks as follows:

"There is no question, however, as the Govern-

ment concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes paid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. 'It follows the lands in the hands of the vendee, all persons being chargeable with a knowledge of its existence.' *Driggers v. Cassady*, 71 Ala. 529, 534. See, also *Swann v. State*, 77 Ala., 545; *State v. Alabama Educational Foundation*, 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified. We recognized the validity of such a provision in *New York v. MacLay*, 288 U. S. 290, 292, 53 S. Ct. 323, 324, 77 L. Ed. 754, where we observed that a tax lien created in a similar manner under a statute of New York 'is effective for many purposes, though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid.' The precise decision in that case allowing priority to the United States under R. S. Sec. 3466, 31 U. S. C. A. Sec. 191, for debts due by an insolvent corporation over claims of the State for franchise taxes due but not assessed or liquidated until after a receivership, in no way detracted from the recog-

nition of the effectiveness of the state law creating a lien as against mortgagees and purchasers. As the court said, 'Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers become chargeable with notice.' 288 U. S. page 293, 53 S. Ct. 324, 77 L. Ed. 754. See also, *Osterberg v. Union Trust Co.*, 93 U. S. 424, 425, 428, 23 L. Ed. 964; *People v. Commissioners*, 104 U. S. 466, 568, 26 L. Ed. 632. Compare *Shotwell v. Moore*, 129 U. S. 590, 598, 9 S. Ct. 362, 364, 32 L. Ed. 827. The lien in such a case, though inchoate on the date specified and maturing when the extent of liability is ascertained by the statutory process, is similar in that respect, as the court said in the Maclay case, to the lien of a transfer tax or duty upon the estate of a decedent which is effective although the amount is ascertained after death."

This is not an action brought by Appellees Ferry County and Stevens County, Washington, against the United States for the recovery of taxes, but an action brought by the United States against the Washington Water Power Company and other defendants, including the above named counties, and the petition alleges that "Ferry County, Washington; Stevens County, Washington, . . . having or claiming to have any right, title, estate, lien or interest in or to the land described above as Tract 1, or any part thereof, claims some interest therein, the exact nature and amount whereof is unknown to petitioner." (T. of R., p. 17-18). And in the prayer of said petition pray that "Court proceed to determine the interest of the defendants herein." (T. of R. p. 19). Appellees Ferry County and Stevens County, Washington, appeared and by evidence (T. of R. 66-85) established the

amount of their lien for taxes and judgment was entered in their favor as follows: "The defendant Stevens County, Washington, in the sum of One Thousand Nine Hundred Seventy Dollars and Seventy-six Cents (\$1,970.76) with interest on said sum at the rate of 6% per annum from December 9, 1939, until paid, and in favor of the Defendant Ferry County, Washington, and against the United States of America in the sum of One Thousand Thirty-three Dollars and Twenty Cents (\$1,033.20) with interest at the rate of 6% per annum from December 9, 1939, until paid." (T. of R. p. 303-304).

Under the laws of the State of Washington, and of the United States of America, pertaining to Eminent Domain Procedure, all defendants are required to establish any claim, title, or interest they may have in or to the property in controversy in order that the Court may determine to whom compensation shall be paid and the amount thereof, and these defendants and appellees were made parties defendant by the United States of America for that purpose and for said reason as a matter of law and equity are proper parties to said action and the Court has jurisdiction to settle any and all controversies that might be raised by and between all the parties to said action and the rule that the United States cannot be sued except with its permission and consent, or through the Court of Claims, has been waived by the United States in this action, and the Court has the jurisdiction and authority in this action to enter a judgment in favor of these appellees.

This question was determined by the Supreme Court of the United States in *Luckenback S. S. Co. vs. Norwegian Barque Thekla*, 266 U. S. 328 L. ed. 313, 45 S. Ct. 112. "When the United States comes into Court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." Citing *Western Maid (United States v. Thompson)*, 257 U. S. 419, 66 L. ed 299). *The Siren*—7 Wall, 152, 19 L. ed. 129.

The Court also stated in the Luckenback case cited above as follows:

"And it is reasonable for the Court to proceed to the determination of all questions legitimately involved even when it results in judgment for damages against the United States." Citing *Nuestra Senora de Regla*, 108 U. S. 92, 27 L. ed. 662. *The Paquete Habana (U. S. vs. Paquete Habana)*, 189 U. S. 453, 47 L. ed. 901).

There is no dispute as to the amount of the lien at the time of the declaration of the taking on December 9, 1939, nor that the levy and assessment had been made on the 2nd Monday of October, 1939, prior to the taking of said property by the United States of America, or that a lien for taxes existed from and after January 1, 1939. The only dispute in this case so far as we are able to ascertain is not as to the legality or amount of the lien, but is as to the correctness of the court's construction of the Washington Statute, Section 11265, Washington Revised Statutes annotated, (Remington 1932 as amended by laws 1935, C. 30 sec. 7 as amended by laws of 1939 c. 206, sec.

45, p. 766) as to the time of the attachment of lien between grantor and grantee. The validity of tax liens created by state laws was recognized upon property acquired by the United States of America and the constitutionality of state laws creating them, affirmed by the Supreme Court of the United States in the case of *United States vs. Alabama*, 313 U. S. 274. The above case differs from the case at bar in this, it was prosecuted by the United States of America with the object and for the purpose of quieting title to lands purchased by the United States after the lien created by state laws had attached. The court denied the prayer of the petition of the United States. It is a well settled rule of law that at the time of transfer or conveyance of title to the lands involved in the case at Bar was on December 9, 1939, was equivalent and analogous to the issuance of a deed as between parties. That is the date the government became the owner of the lands in question. Subject, of course, that the interest of various parties be ascertained, the amount of just compensation "to be paid therefore" which has been done in this particular case so far as the appellee counties are concerned.

We admit there would be no question as to the validity or enforcement of the tax lien by the respective counties if United States had sold the property, in controversy in this action, to an individual between December 9, 1939, and February 14, 1940, inclusive: the purchaser from the United States would have to pay the tax lien, or the property in due course would be sold for the non-payment of the particular tax

items in controversy herein. Taking also this position, if the United States had sold this property to some individual on February 15, 1940, or at any subsequent date in order to give that individual title in fee simple to the premises, it would be necessary for the United States as vendor to pay the tax lien involved in this action; and under the decision in *United States v. Alabama*, cited above, if the United States failed to pay the tax that the respective counties could then foreclose under the state law and obtain this land from the vendee of the United States as the tax lien had never been paid, therefore, was not extinguished.

CONCLUSION

We respectfully urge that that part of the judgment awarding to Ferry County, Washington, and Stevens County, Washington, the respective sums set out therein, should be affirmed on the government's appeal.

Respectfully submitted,

OSEE W. NOBLE,

F. LEO GRINSTEAD,

*Attorneys for Ferry County and
Stevens County, Washington,
Appellees.*

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to file and have considered the attached memorandum in
opposition.

Respectfully submitted,

Wm. E. T. Yerman

W. E. T. Yerman

622 Spokane and Eastern Building
Spokane, Washington.

Attorneys for Appellants and
Cross-appellees.

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opposition.

Respectfully submitted,

Wm. E. T. Herman

W. E. T. Herman

622 Spokane and Eastern Building
Spokane, Washington.

Attorneys for Appellants and
Cross-Appellees.

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Wm. E. T. Herman

W. E. T. Herman

622 Spokane and Eastern Building
Spokane, Washington.

Attorneys for Appellants and
Cross-appellees.



FOI

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10

to file and have considered the attached memorandum in
opposition.

Respectfully submitted,

Wm. R. Laine

W. E. T. Sherman

622 Spokane and Eastern Building
Spokane, Washington.

Attorneys for Appellants and
Cross-Appellees.

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NAVY
WASHINGTON
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20540

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

VS.

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDERICK
L. BROWN, Deceased,

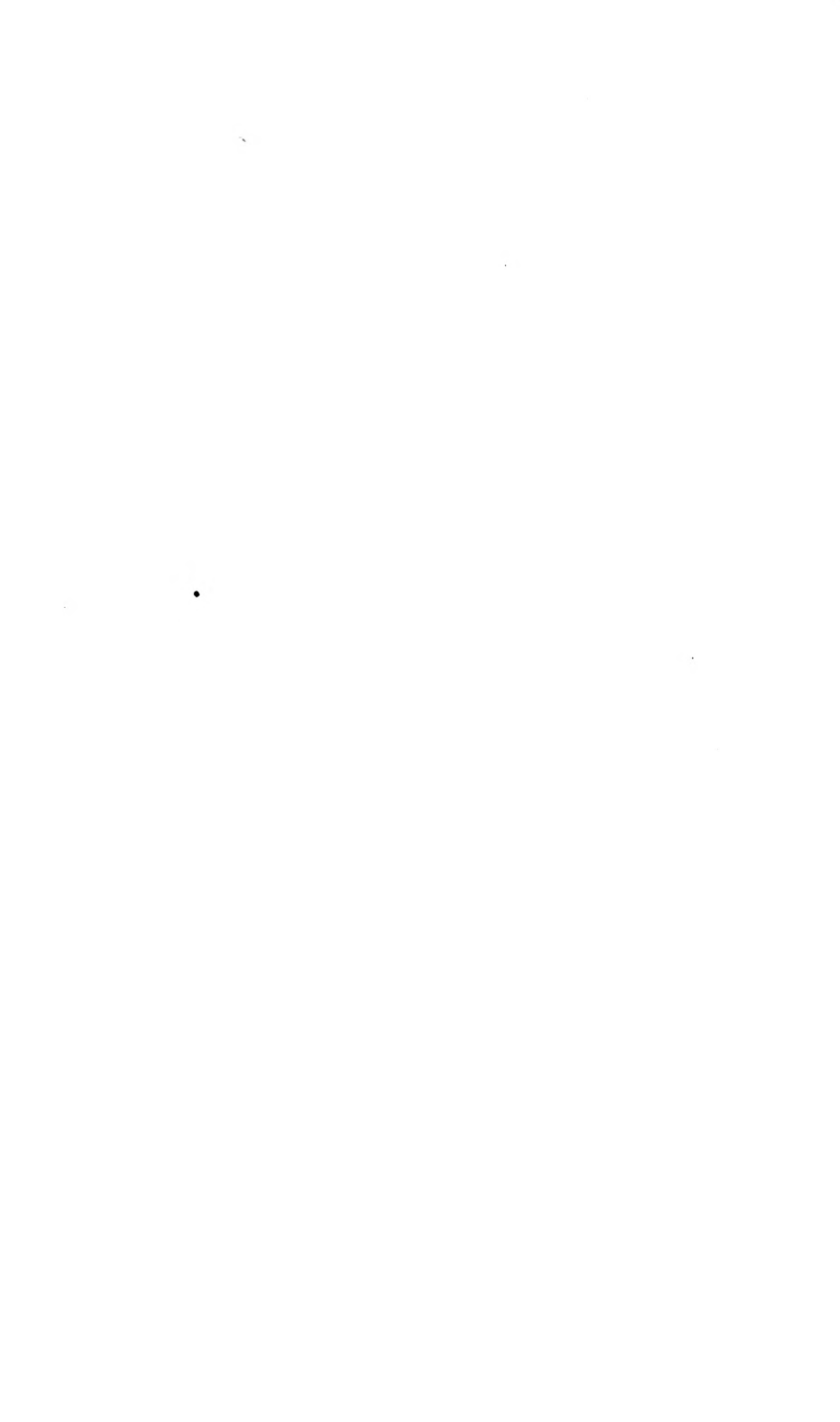
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

AUG - 6 1942



United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDERICK
L. BROWN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
600 Postoffice and Court House
Bldg., Los Angeles, Calif.

For Appellee:

CLARK J. MILLIRON,
518 Fidelity Bldg., Los Angeles, Calif. [1*]

In the District Court of the United States, Southern
District of California, Southern Division.

At Law No. 1400-Y

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDER-
ICK L. BROWN, Deceased,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

*Page numbering appearing at foot of page of original certified Transcript of Record.

COMPLAINT

I.

Plaintiffs bring this action against the United States under the provisions of 28 U. S. Codes, Sec. 41, paragraph 20, for the recovery of estate tax paid to the Collector of Internal Revenue, Sixth District of California, in a sum less than \$10,000.00, as hereinafter more fully appears.

II.

The plaintiffs, Austen G. Brown and Marian B. Kenyon, at all times herein mentioned were and now are the duly appointed, qualified and acting executors of the last Will and Testament of Frederick L. Brown, deceased, who died on the 8th day of August, 1934; the said plaintiffs having qualified on August 31, 1934, as Executors, in the Superior Court of the State of California, in and for the County of San Diego, and bring this action in their capacity as such Executors.

III.

That on the 15th day of August, 1923, the aforesaid Frederick L. Brown, deceased, and his wife Marian M. Brown, deceased, [2] by an instrument in writing, created a certain Trust whereby 130¼ shares of the capital stock of Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, were by them transferred and delivered to Frederick L.

Brown, F. Walton Brown and Austen G. Brown, or the successors of them, as trustees, and whereby said Frederick L. Brown transferred all of his right, title and interest in and to said 130 $\frac{1}{4}$ shares of stock to said trustees, and retained no right, title or interest in or to, or control over said shares of stock, or any thereof, in said Frederick L. Brown and/or said Marian M. Brown; said trust and an irrevocable trust providing that certain amounts of money were to be paid to the trustors, certain amounts were to be accumulated, and certain amounts were to be paid to other beneficiaries; said trust to terminate on the death of said Frederick L. Brown, deceased, and Marian M. Brown, deceased, and that said trust was never revoked or modified, and said trust terminated, according to its term, on February 8, 1940, on the death of said Marian M. Brown, a copy of which said trust indenture is a part of Exhibit "A" attached hereto and made a part hereof the same as if fully set forth herein. No right of alteration or amendment, or other right of revocation or control was retained by decedent or his said wife Marian M. Brown, deceased, either alone or with any other person.

IV.

The aforesaid trust was not created in contemplation of death, nor was it intended to take effect in possession or enjoyment at or after death of the decedent.

V.

That on or about June 10, 1935, the plaintiffs herein as Executors, duly filed an estate tax return for said estate with the Collector of Internal Revenue of the Sixth District of California, in which said return the plaintiffs claim that the aforesaid trust [3] was not subject to estate tax and no value whatsoever was placed upon the assets of said trust in said return. The return, as filed, disclosed that no estate tax whatsoever was due from said estate.

VI.

Thereafter the Treasury Department of the United States, by or through the Commissioner of Internal Revenue, caused the Internal Revenue Agent in Charge at Los Angeles, California, to make an investigation of the assets of said estate for the purpose of determining the amount of estate tax due to the United States and on July 3, 1936, the Commissioner of Internal Revenue issued a deficiency letter, bearing the symbols MT-ET-7083-6th California, and in which said deficiency letter the said Commissioner wrongfully and illegally determined the total value of the gross estate subject to estate tax to be the sum of \$189,552.82, and in which said gross estate the Commissioner wrongfully and illegally included, as a part of the estate subject to tax, the value of 31% of the aforesaid 130 $\frac{1}{4}$ shares of stock in said Gardena Syndicate owned by the Trustees aforesaid and wrongfully and illegally determined the value of said portion of said stock to

be the sum of \$142,552.05; claiming that said portion of said stock should be included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended. A copy of said deficiency letter is attached hereto, marked Exhibit "B" and made a part hereof the same as if the said letter were fully set forth herein.

VII.

That neither the said 31% of the said 130¼ shares of stock of said Gardena Syndicate nor any other per cent or portion of said stock is, or at any time herein mentioned was, a part of said estate of said Frederick L. Brown, deceased.

That neither the said value of 31% of the said 130¼ shares of stock of said Gardena Syndicate, so wrongfully and il- [4] legally determined to be the sum of \$142,552.05, nor any part of the value of the said stock is, or at any time herein mentioned was, a part of said estate of said Frederick L. Brown, deceased.

VIII.

The Commissioner determined that the plaintiffs were entitled to deductions under the provisions of the Revenue Act of 1926 in the amount of \$107,779.85, leaving a net estate wrongfully and illegally claimed to be subject to tax under the Revenue Act of 1926 in the amount of \$81,772.97. The Commissioner further determined that the plaintiffs were entitled to deductions under the provisions of the Revenue Act of 1932 in the amount of \$57,779.85,

leaving a net estate wrongfully and illegally claimed to be subject to tax under the Revenue Act of 1932 in the amount of \$131,772.97; whereupon the Commissioner of Internal Revenue wrongfully and illegally determined that there was an estate tax due from the plaintiffs in the amount of \$8,735.70.

IX.

The Treasury Department of the United States, by and through the Commissioner of Internal Revenue, in accordance with and pursuant to said deficiency letter, in the month of February, 1937, wrongfully and illegally made an assessment of the aforesaid estate tax against the plaintiffs, as Executors, in the amount of \$8,735.70, together with interest in the amount of \$798.90, being a total tax and interest of \$9,534.60 wrongfully and illegally assessed; whereas in truth and in fact there was no tax or interest in any amount due from the plaintiffs.

X.

Thereafter the Collector of Internal Revenue of the 6th District of California made demand upon the plaintiffs in their capacity as Executors of aforesaid estate for the payment of said tax so wrongfully and illegally assessed, and in order to avoid [5] penalties, interest, distraint and/or summary proceedings for the collection of said tax, the plaintiffs, in their capacity as Executors, as aforesaid, on March 1, 1937, pursuant to said demand, made payment to said Collector of Internal Revenue of the 6th District of California, of the total amount

of tax and interest as aforesaid in the amount of \$9,534.60.

XI.

Plaintiffs allege that in truth and in fact the total gross estate of the aforesaid estate was the sum of \$47,000.77, and no more, that said amount included each and every item returned by the plaintiffs and valued by the Commissioner of Internal Revenue, with the exception of the aforesaid 31% of said stock of Gardena Syndicate owned by the aforesaid trustees, of a value of \$142,552.05.

XII.

That the plaintiffs are entitled to deductions from the aforesaid gross estate, under the provisions of the Revenue Act of 1926 in the amount of \$107,779.85, leaving no net estate subject to tax under the Revenue Act of 1926.

XIII.

That plaintiffs are entitled to deductions under the provisions of the Revenue Act of 1932 in the amount of \$57,779.85, leaving no net estate subject to tax under the provisions of the Revenue Act of 1932, and that no estate tax in any amount was properly due from plaintiffs or said estate.

XIV.

On December 15, 1939, plaintiffs duly filed a claim for refund of the aforesaid estate tax and interest in the amount of \$9,534.60, a copy of which said claim for refund is attached hereto, marked Ex-

hibit "A" and made a part hereof, the same as if said claim had been fully set forth herein. [6]

XV.

That on April 1, 1940, the Commissioner of Internal Revenue wrongfully and illegally rejected said claim for refund and wrongfully and illegally refused to pay plaintiffs the money, or any part thereof, asked for and demanded in said claim for refund, which said rejection was made in a letter bearing symbols MT-ET-70S3-6th California, a copy of which said letter is attached hereto, marked Exhibit "C" and made a part hereof the same as if it were fully set forth herein.

XVI.

That no part of said tax has ever been repaid, refunded, credited or otherwise made available to plaintiffs herein. Wherefore the plaintiffs averring that they are entitled to said refund, bring this action in this court pursuant to the Statutes of the United States to recover said estate tax illegally assessed and collected, as aforesaid.

Wherefore, plaintiffs demand judgment against the said defendant in the sum of \$9,534.60, with interest thereon at 6% per annum from March 1, 1937, and for costs herein expended, and for all other and proper relief.

CLARK J. MILLIRON

Attorney for Plaintiffs,
518 Fidelity Building,
Los Angeles, California.

(Duly Verified.)

[7]

EXHIBIT A

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)
Copy.

CLAIM

To Be Filed with the Collector Where Assessment
Was Made or Tax Paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.

Abatement of Tax Assessed (not applicable to
estate or income taxes).

State of California

County of San Diego—ss:

Name of taxpayer or purchaser of stamps, Es-
tate of Frederick L. Brown, Deceased, Austen G.
Brown and Marian B. Kenyon, Executors.

Date of death, August 8, 1934.

Business address, c/o Brown, Bissell & Berry,
Attorneys, 912 Rowan Bldg., Los Angeles, Califor-
nia.

Residence, 230 Prospect Street, La Jolla, Califor-
nia.

The deponent, being duly sworn according to law,

EXHIBIT A—(Cont.)

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Los Angeles Sixth District, California.

2. Period (if for income tax, make separate form for each taxable year) from...., 19.., to...., 19...

3. Character of assessment or tax, Estate tax.

4. Amount of assessment, \$9,534.60; dates of payment, March 1, 1937.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded, Tax \$8735.70, interest \$798.90—\$9,534.60.

7. Amount to be abated (not applicable to income or estate taxes).... \$......

8. The time within which this claim may be legally filed expires, under Section 810(a) of the Revenue Act of 1932, on March 1, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

As shown by the attached sworn statement of F. Walton Brown.

That the original estate tax return for the estate of Frederick L. Brown, deceased, was made by the undersigned Austen G. Brown and Marion Brown Kenyon, as executors of said Estate and the tax, of which

EXHIBIT A—(Cont.)

refund is sought, was paid by them as such executors and that they are now the duly qualified and acting executors of said estate.

Signed MARIAN B. KENYON

AUSTEN G. BROWN

Executors of the Estate of

Frederick L. Brown, Deceased.

Sworn to and subscribed before me this 27 day of November 1939.

MADALENE MAHER

Notary Public.

My com. Exp. Apr. 21, 1942. [8]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Class of tax and taxable year or period—Assessment List, List, Month, Year—Account No. or Page, Line—Amount assessed. Total, \$. . . .—Claim No. . . .

Paid, Abated, or Credited, Date, Amount—Total, \$\$.

Pd. Ab. Cr.

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued—Kind—Number—De-

EXHIBIT A—(Cont.)

nomination—Date of sale or issue—Amount \$.

If special tax stamp, state: Serial number, Period commencing—.

.....,

Collector of Internal Revenue.

.....

(District)

Claim examined by.....

Claim approved by

.....

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed \$.

Amount allowed \$.

Amount rejected \$.

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered

EXHIBIT A—(Cont.)

without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

State of California

County of Los Angeles—ss.

F. Walton Brown, being first duly sworn, deposes and says:

That Austen G. Brown and Marion Brown Kenyon, the Executors of the Estate of Frederick L. Brown, deceased, who died August 8, 1934, duly filed

EXHIBIT A—(Cont.)

an estate tax return with the Collector of Internal Revenue at San Diego, California, on June 10, 1935, in which said return they showed no estate tax to be due. Thereafter an Internal Revenue Agent made an examination and valuation of the assets of the estate and made certain changes in the various items therein. In the revaluation of the estate, and acting upon said report, the Commissioner of Internal Revenue determined that 31% of 130 $\frac{1}{4}$ shares of Gardena Syndicate, amounting to \$142,552.05, should be added to the gross estate, under the provisions of Section 302(c) of the Revenue Act of 1926, as amended, and on the theory that the decedent had made a transfer in trust of said stock under a trust indenture wherein he retained the right to receive a portion of the income from the trust estate during his lifetime, and that during the lifetime of said decedent the proportion of the income from the trust estate received by him amounted to approximately 31% of the total income of the trust estate during his lifetime, and therefore, that 31% of the value of said shares in Gardena Syndicate were taxable as a part of the estate of the deceased.

The decedent during his lifetime and on the 15th day of August, 1923, transferred to Frederick L. Brown, F. Walton Brown and Austen G. Brown, as trustees 130 $\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a California corporation. Under the trust indenture it was provided that the trustor should receive from the income of the trust estate

EXHIBIT A—(Cont.)

the sum of \$30,000.00, and in addition should receive from such income the sum of \$500.00 per month during his lifetime; that his wife should receive from such income during [9] her lifetime the sum of \$500.00 per month; and that in addition to the above, the trustor was to receive one-fifth of any income in excess of the amounts specifically provided to be distributed as aforesaid. That during his lifetime, as a result of such provisions of said trust, the decedent actually received approximately 31% of the total income of said trust, which said 31% included said \$30,000.00, the monthly income of \$500.00, and one-fifth of the excess income above mentioned.

That there is attached hereto a copy of the trust indenture herein referred to. That said indenture was irrevocable and was in full force and effect at the time of the death of said Frederick L. Brown. That the entire tax for which refund is claimed by the Executors resulted from the inclusion in the gross estate of said decedent of the sum of \$142,552.05 as the valuation of said 31% of 130¼ shares of Gardena Syndicate, as without the inclusion of said stock the estate of said decedent was not subject to tax. That said trust was not a transfer of property in contemplation of death, for the following reasons:

That said decedent at the time of the execution of said trust agreement in August of 1923 was in excellent health and was of the age of about fifty-six years, and that the transfer of said 130¼ shares

EXHIBIT A—(Cont.)

of Gardena Syndicate stock into said trust was intended and made by said decedent as a gift to his wife and children. That affiant is the son of said decedent and is familiar with the facts and circumstances surrounding the transfer of said 130¼ shares of Gardena Syndicate stock into the trust above mentioned by said decedent, and with the motives which actuated him in making said transfer.

That said stock was acquired by said decedent about the year 1906. That about the year 1915 an oil well was being drilled in the vicinity on the property owned by said Gardena Syndicate, [10] and at the time said well was being drilled affiant and his father, the said decedent, made several trips to said property and the well being drilled in the vicinity thereof, and that on said trips said decedent discussed with affiant the possibility of the production of oil on the property of said Gardena Syndicate, and said decedent stated that if he ever got money from oil from said property he would divide the same with his wife and three children, F. Walton Brown, Marion Brown, now Marion Brown Kenyon, and Austen G. Brown. That said well was unsuccessful and that thereafter there seemed no possibility of oil development in that vicinity until said Gardena Syndicate commenced negotiations for an oil lease on said property to Burnham Exploration Company about the year 1922. That such a lease was made and the drilling of an oil well was commenced on the property of said Gardena Syndicate

EXHIBIT A—(Cont.)

during the year 1922, and during the early part of the year 1923 a discovery of oil was made upon said property.

That at the time of negotiations for said lease and frequently thereafter, and up to the time of the execution by said decedent of said trust agreement in August of 1923, said decedent discussed with affiant the division with his children and his wife of the money to be received from oil on said property, and referred to his former promises to divide the same with his wife and children, and stated that he intended to retain one-fifth of his stock in said Gardena Syndicate, and to give one-fifth to his wife, and one-fifth to each of his said three children, in order that the income therefrom might be received individually by each of said five persons, and in order that said decedent would not have to pay a high rate of income tax thereon, and also in order that his said wife and children should have the opportunity to handle and spend his own money and to live comfortably without being dependent upon the bounty of said decedent. That affiant called the attention of [11] said decedent to the fact that the amount of income to be received from said property, and the continuance thereof, was extremely speculative and uncertain, and that neither affiant nor his brother nor sister would be willing to accept such a gift unless the continuance of a substantial income to said decedent and his wife, their mother, was in

EXHIBIT A—(Cont.)

some manner assured during the period of oil production. That said decedent then requested affiant to work out a plan which would accomplish this purpose, and affiant thereupon prepared and discussed with said decedent the form of trust agreement which was finally entered into on August 15, 1923, a copy of which is hereto annexed.

That at the time of the execution of said trust agreement and at various times thereafter said decedent stated that he greatly appreciated the attitude of his children in desiring to protect himself and their mother in the enjoyment of a substantial income while the oil wells on said property lasted, but that he did not expect to live highly himself and if the income should be lower than the amount reserved to himself and his wife that he would still give a portion thereof to his children.

That on many occasions both before and after the execution of said trust agreement and the transfer of said stock to the trustees thereof, said decedent stated to affiant that his belief was that it was far better for his family to have experience in the handling of money and to learn to use it judiciously than to have it doled out to them by him.

That said transfer by said decedent was not made by said decedent from any motive connected with or in contemplation of death and was intended by said decedent as a gift to his wife and said children.

(Sgd) F. WALTON BROWN

EXHIBIT A—(Cont.)

Subscribed and sworn to before me this 21 day of October, 1939.

ASTRID ROGNES

Notary Public in and for the County of Los Angeles, State of California. [12]

TRUST INDENTURE

This Indenture made this 15th day of August, 1923, by and between Frederick L. Brown and Marian M. Brown, his wife, and Frederick L. Brown, F. Walton Brown and Austen G. Brown, trustees for Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marion Brown Kenyon,

Witnesseth:

That said Frederick L. Brown in consideration of the love and affection he bears towards his said wife, Marian M. Brown, and his children, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon, does hereby by these presents transfer, convey, assign and set over unto the said Frederick L. Brown, F. Walton Brown, and Austen G. Brown, trustees, and their successors or successor, the following described property, to wit:

130 $\frac{1}{4}$ shares of the capital stock of the Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, evidenced by Certificate No.

EXHIBIT A—(Cont.)

147 to be held by said Frederick L. Brown, F. Walton Brown and Austen G. Brown, and their successors or successor in trust for the following uses and purposes:

First: During the natural life of said Frederick L. Brown, and Marian M. Brown and the survivors of them, the trustees or trustee hereunder shall have, hold and control all of said property, and shall have and exercise all of the rights and powers of the holder of the legal title thereof, for the purpose of managing and controlling the same, and the rights and interests represented thereby, in such manner as to said trustees or trustee may seem for the best interests of said trust, it being understood that said trustees or trustee shall have the right to sell and convey all or any part of said property for cash, or to exchange all or any part thereof for other property or secured loans. [13]

Second: Out of the income, rents, issues and profits of said property, hereinafter referred to as income, in so far as the same shall be sufficient to do so, to make the payments hereinafter provided for; it being hereby expressly provided that all stock dividends and moneys received in consideration of the exchange or sale of said property shall be deemed to be a part of the principal of said property, and shall not be deemed to be income. The payments to be made by said trustees out of said income are the following and shall be made in the following order of priority:

EXHIBIT A—(Cont.)

1. To pay to said Frederick L. Brown, as the same is received, the first thirty thousand dollars (\$30,000) of income received from said trust property.

2. After the payment of said sum of Thirty Thousand Dollars (\$30,000).

(a) To pay to said Frederick L. Brown during the term of his natural life, on the first day of each calendar month, the sum of Five Hundred Dollars (\$500), or so much thereof as can be paid out of the amount of said income in the hands of said trustees or trustee upon the first of each such month.

(b) To pay to said Marian M. Brown during the term of her natural life on the first day of each calendar month, the sum of Five Hundred Dollars (\$500.00), or so much thereof as can be paid out of the income remaining in the hands of said trustees or trustee on the first day of each such month after paying said sum of Five Hundred Dollars (\$500) to said Frederick L. Brown.

(c) In the event of the death of either said [14] Frederick L. Brown or Marian M. Brown, to pay the survivor of them on the first day of each calendar month, during the term of his or her natural life, the further sum of Five Hundred Dollars (\$500), or so much thereof as can be paid out of the income remaining in the hands of said trustees

EXHIBIT A—(Cont.)

or trustee on the first of each such month.

3. Subject to the making of the payments above provided for and in order to provide a fund for the making of subsequent monthly payments, said trustees or trustee shall accumulate out of the said income, a fund of Twelve Thousand Dollars (\$12,000).

4. To pay to said Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon in equal shares on the first day of each calendar month, the aggregate surplus, if any, of the income in excess of said sum of Twelve Thousand Dollars (\$12,000) which shall then remain in the hands of said trustees after making the monthly payments above provided for to said Frederick L. Brown and Marian M. Brown, or the survivor of them. In the event of the death of either said Frederick L. Brown or said Marion M. Brown, that part of the income which would be payable to such decedent if living, under the provisions of this subdivision 4, shall be paid by said trustees or trustee to the survivor of them. In the event of the death of said F. Walton Brown or said Austen G. Brown or said Marian Brown Kenyon, or either of them, the income above referred to which would be payable to such decedent if living, [15] shall be paid by said trustees or trustee, as follows:

(a) If such decedent leave surviving him

EXHIBIT A—(Cont.)

(or her) issue and spouse, to the children of such decedent and the issue of deceased children, per stirpes and not per capita, in equal shares, (four fifths ($\frac{4}{5}$) of) the portion of said income which such decedent would have received if living, (and the surviving spouse, one-fifth ($\frac{1}{5}$) of the portion of said income which such decedent would have received if living).

(b) If such decedent leave surviving him or her issue but no spouse, to the children of such decedent and the issue of deceased children per stirpes and not per capita, in equal shares, the portion of said income which such decedent would have received if living.

(c) If such decedent leave surviving him or her spouse but no issue, then to the surviving spouse of such decedent one-fifth of the portion of said income which such decedent would have received if living, and the remaining four-fifths ($\frac{4}{5}$) of the portion of said income which such decedent would have received if living shall be payable as if such decedent had not been mentioned in this subdivision 4 of this Paragraph Second.

(d) If there be no children or issue of deceased children or surviving spouse of such decedent, then the portion of said income which such decedent would have received if living shall be payable as [16] if said decedent had

EXHIBIT A—(Cont.)

not been mentioned in this subdivision 4 of this Paragraph Second.

Third: The trust hereby created shall terminate upon the death of the survivor of said Frederick L. Brown and said Marian M. Brown, and thereupon the title to said trust property shall vest absolutely in equal shares in F. Walton Brown, Austen G. Brown and Marian Brown Kenyon, or in the event that any of them be not living, the share of such decedent or decedents shall vest in equal shares, as follows:

(a) If such decedent leave surviving him or her issue and spouse, four-fifths ($4/5$) of the interest in said trust property which such decedent would have received if living shall vest in equal shares in his or her children and the issue of his or her deceased children, per stirpes and not per capita, and the remaining one-fifth ($1/5$) of the interest in said trust property which he or she would have received if living shall vest in the surviving spouse.

(b) If such decedent leave surviving him or her issue but no spouse, then the interest in said trust property which such decedent would have received if living shall vest in equal shares in his or her children and the issue of his or her deceased children, per stirpes and not per capita.

(c) If such decedent leave surviving him

EXHIBIT A—(Cont.)

or her spouse but no issue, then one-fifth ($1/5$) of the interest in said trust property which such decedent would have received if living shall vest in the surviving spouse and the title to the remaining four-fifths ($4/5$) thereof shall vest as if [17] such decedent had not been named in this Paragraph Third.

(d) If such decedent leave no issue or spouse surviving him or her, then the interest in said trust property which such decedent would have received if living shall vest as if such decedent had not been named in this Paragraph Third.

Fourth: In case during the continuance of said trust said trustees or any of them shall die, resign or become incapable of acting hereunder, then the following named persons in the following order, to-wit: Marian M. Brown, Marian Brown Kenyon, Mary Clark Brown and Annie Scripps Brown shall successively become trustees hereunder to fill the vacancies created by such death, resignation or incapacity, it being the intention of the parties hereto that there shall always be three trustees so long as there remain three persons willing and able to act as such trustees from the persons now acting as trustees and the persons above named, designated to fill the vacancies.

Fifth: Said F. Walton Brown and said Austen G. Brown shall each have the right to make assignments of not exceeding a total of one-half of his

EXHIBIT A—(Cont.)

beneficial life interest in the income of said trust property to his wife, and/or to his child or children who shall have reached the age of majority at the time of such assignment, but otherwise all of the beneficiaries hereunder shall be subject to the provisions of the following paragraph and to the restraints therein provided for, and in the event of any such assignment to wife or child, the assignee shall be subject to said provisions and restraints, and no such assignment shall anyway affect the distribution of the principal or income of the trust property upon the death of the assignor.

Sixth: With the exceptions mentioned in the last paragraph, each and every beneficiary under this trust is hereby restrained [18] from and/or shall be without authority, right or power to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any manner affect or impair his, her or their beneficial and legal rights, title, interest, claims and estates in and to the income and/or principal of this trust during the entire term hereof, nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors or any beneficiary nor subject to nor liable to any process of law or court, nor be transferable by operation of law in any manner whatsoever, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above designated beneficiaries hereunder at the time entitled to take the same under

EXHIBIT A—(Cont.)

the terms of this trust or the duly appointed guardian of such beneficiary, and the personal receipt of the designated beneficiary hereunder or of the guardian shall be a condition precedent to the payment or delivery of the same by said trustees to each such beneficiary.

Seventh: The trustees or trustee hereunder shall be entitled to no compensation for their services in the administration of the trust hereby created except such as may be agreed to in writing by all of the beneficiaries hereunder.

In witness whereof the parties hereto have set their hands this 15th day of August, 1923.

FREDERICK L. BROWN

MARIAN M. BROWN

Trustors

FREDERICK L. BROWN

F. WALTON BROWN

AUSTEN G. BROWN

Trustees for Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon. [19]

POINTS AND AUTHORITIES UPON CLAIM
FOR REFUND

In the Estate of Frederick L. Brown, Deceased.

Date of Death—August 8, 1934.

The transfer in trust made by the above named decedent in August, 1923, is not subject to tax and

no part of the property transferred should have been included in the gross estate of said decedent by the Commissioner of Internal Revenue.

Hasset v. Welch, Helvering v. Marshal, 303 U. S. 115, 82 Lawyers' Edition 858; Commissioner of Internal Revenue v. Kaplan (C. C. A. First Circuit), 102 Fed. (2d) 229; First Nat'l Bank of Boston v. Welsh (Dist. of Mass.), 24 Fed. Supp. 695; Blakeslee v. Smith (Dist. of Conn.), 26 Fed. Sup. 28; Webster v. Commissioner, 38 B. T. A. 273, Adv. Sheet Dec. No. 40; Estate of Kellogg, 40 B. T. A., Advance Sheet Nov. 22, 1939, #139. [20]

EXHIBIT "B"

Treasury Department
Washington

Office of Commissioner
of Internal Revenue.

Address Reply to Com-
mission of Internal Revenue

and Refer to

MT-ET-7083-6th California

Date of Death—August 7, 1934

Jul-3 1936

Austin G. Brown, et al., Executors,
230 Prospect Street,
La Jolla, California.

Sirs:

A deficiency in the Federal Estate tax liability of the above-named estate is hereby proposed as

EXHIBIT B—(Cont.)

the result of an examination of the return, Form 706, the Revenue Agent's report, and other data on file.

If you acquiesce in the proposed deficiency, you are requested to execute and forward the enclosed Form 890, which is a waiver of the statutory restrictions upon the immediate assessment and collection of the deficiency. The submission of the waiver will expedite the closing of the case and will also lessen the accumulation of interest, since the interest period will then terminate thirty days after filing of the waiver or on the date of assessment, whichever is earlier. Should you desire to consent to the assessment and collection of only a part of the deficiency, the waiver may be executed for such partial amount. The execution of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. [21]

The issuance of this notice does not permit a petition to the United States Board of Tax Appeals. However, a protest against the proposed deficiency may be filed within 30 days from the date of this letter. If a hearing is desired in this office, or if no hearing is contemplated, the protest should be filed with this office. If a hearing is desired in the local division, the protest should be filed with the Internal Revenue Agent in Charge, Los Angeles Division. A protest must be filed in duplicate, and (a) present fully the grounds upon which made, supported by the evidence relied upon, and (b)

EXHIBIT B—(Cont.)

state whether a hearing is requested. Any statements of fact included therein must be under oath.

If the case cannot be closed upon the basis of a waiver, or if a protest is not filed within the specified time, a formal notice of deficiency will be issued under section 308(a) of the Revenue Act of 1926, as amended, and you may then petition the United States Board of Tax Appeals for redetermination of the tax liability.

A copy of this letter is being forwarded to the Internal Revenue Agent in Charge at 939 South Broadway, Los Angeles, California.

Examination of the return discloses the following:

EXHIBIT B—(Cont.)

	<u>Returned</u>	<u>Tentatively Determined</u>	
Gross estate	\$ 43,768.87	\$189,552.82	
Deductions (1926 Act)	108,976.25	107,779.85	
Net estate (1926 Act)	\$ 0.00	\$ 81,772.97	
Gross estate	\$ 43,768.87	\$189,552.82	
Deductions (1932 Act)	58,976.25	57,779.85	
Net estate (1932 Act)	\$ 0.00	\$131,772.97	[22]
1. Gross tax (1926 Act)	\$0.00	\$ 1,135.46	
2. Credit for gift tax	0.00	0.00	
3. Gross tax less gift tax credit	0.00	1,135.46	
4. Credit for estate or inheri- tance tax	0.00	677.06	
5. Net tax (1926 Act)	\$0.00		\$ 458.40
6. Total gross taxes (1926 and 1932 Acts)	\$0.00	\$ 9,412.76	
7. Gross tax 1926 Act	0.00	1,135.46	
8. Gross additional tax	\$0.00	\$ 8,277.30	
9. Credit for gift tax	0.00	0.00	
10. Net additional tax	0.00		8,277.30
11. Total net tax	\$0.00		\$ 8,735.70
Amount assessed as deficiency pursuant to waiver	0.00		0.00
Deficiency			\$ 8,735.70

EXHIBIT B—(Cont.)

The deficiency bears interest at the rate of 6 per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

GROSS ESTATE

	<u>Returned</u>	<u>Tentatively Determined</u>
Stocks and Bonds		
Item 3	\$ 72.63	\$ 318.80
Item 4	600.00	3,530.73
Other Miscellaneous Property		
Item 8	300.00	355.00

[23]

GROSS ESTATE (Cont'd.)

Transfers

	<u>Returned</u>	<u>Tentatively Determined</u>
The following described property is included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended:		
31% of 130¼ shares Gardena Syndicate	\$ 0.00	\$142,552.05

DEDUCTIONS

	<u>Tentatively Determined</u>	<u>Returned</u>
Debts of decedent		
Item 4—accrued interest....\$	3.60	\$ 0.00
Unpaid mortgages		
Item 1	0.00	1,200.00
To balance	146,980.35	

EXHIBIT B—(Cont.)

The amount claimed under unpaid mortgages is disallowed since it appears that this item did not represent an outstanding obligation of the decedent at the date of his death.

CREDIT

Credit for State estate, inheritance, legacy, or succession taxes is allowed in the amount paid, and in respect to which the evidence is required by Article 9, Regulations 80 has been submitted. Please advise when the additional credit evidence may be expected.

If the full eighty per cent credit is allowed the net deficiency tax will be \$8,504.39. Execution of the enclosed waiver as to that amount will enable the Bureau to assess the full amount of the probable net tax and expedite the closing of the case.

Respectfully,

(Sgd) D. S. BLISS,

Enclosure:

Deputy Commissioner.

Waiver. [24]

EXHIBIT C

Treasury Department
Washington

Office of

Commissioner of Internal Revenue

Apr. 1, 1940

Address reply to
Commissioner of Internal Revenue
and refer to

MT-ET-7083-6th California

Estate of Frederick L. Brown

Date of Death—August 8, 1934.

Austen G. Brown, et al., Executors,
230 Prospect Street
La Jolla, California.

Gentlemen:

The Bureau has examined the claim filed by you on December 15, 1939, for refund of \$9,534.60 Federal estate tax paid on behalf of the above-named estate under the provisions of the Revenue Act of 1926, as amended.

The claim is based upon the contention that 31 per cent of 130 $\frac{1}{4}$ shares Gardena Syndicate, valued at \$142,552.05, was erroneously included in the determined value of the gross estate.

The estate has cited in support of its claim, among other cases, the decision in the case of Frederick R. Kellogg, 40 B. T. A. 139. The Commission does not acquiesce in the decision *in the decision* in the Kellogg case and holds that the transfer of the full value of the trust in question reduced only by the value of the life estate in decedent's wife is subject to inclusion in the gross estate.

As the amount included is less than what might have been included in the gross estate there is no overassessment of estate tax [25] in this case. Accordingly, your claim filed December 15, 1938, for refund of \$9,534.60 of the Federal estate tax paid

on behalf of this estate under the provisions of the Revenue Act of 1926, as amended, is hereby rejected in its entirety.

Respectfully,
GUY T. HELVERING,
Commissioner,

By: ADELBERT CHRISTY,
Acting Deputy Commissioner.

[Endorsed]: Filed Feb. 13, 1941. [26]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and, in answer to plaintiffs' complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Denies the allegations contained in Paragraph III thereof except that defendant admits that a true copy of said Trust Indenture is attached to plaintiffs' complaint and marked Exhibit "A".

IV.

Denies the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof.

VI.

Admits the allegations contained in Paragraph VI thereof except that defendant denies that any of the determinations or acts of the Commissioner, referred to in said paragraph, were either wrongful or illegal.

VII.

Denies the allegations contained in Paragraph VII thereof. [27]

VIII.

Admits the allegations contained in Paragraph VIII thereof except that defendant denies that the determinations or claims of the Commissioner, therein referred to, were either wrongful or illegal.

IX.

Admits the allegations contained in Paragraph IX thereof except that defendant denies that the assessment, therein referred to, was either wrongful or illegal; and denies that there was no tax or interest in any amount due from plaintiffs.

X.

Admits the allegations contained in Paragraph X thereof except that defendant denies that the assessment, therein referred to, was either wrongful or illegal.

XI.

Denies the allegations contained in Paragraph XI thereof.

XII.

Denies the allegations contained in Paragraph XII thereof.

XIII.

Denies the allegations contained in Paragraph XIII thereof.

XIV.

Admits the allegations contained in Paragraph XIV thereof.

XV.

Admits the allegations contained in Paragraph XV thereof except that defendant denies that the Commissioner's rejection of plaintiffs refund claim and his refusal to pay to plaintiffs the moneys demanded by them in their said claim was or were either wrongful or illegal.

XVI.

Admits the allegations contained in Paragraph XVI thereof except that defendant denies that plaintiffs are entitled to said refund or any part thereof.

Wherefore, having fully answered, defendant prays that it be [28] hence dismissed with its costs in this behalf expended.

WM. FLEET PALMER,
United States Attorney.

EDWARD H. MITCHELL,
Assistant U. S. Attorney.

ARMOND MONROE JEWELL,
Assistant U. S. Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By E. H. MITCHELL,
Attorneys for Defendant.

[Title of District Court and Cause.]

STIPULATION TRANSFERRING PROCEED-
ING TO CENTRAL DIVISION

It is hereby stipulated and agreed by and between the parties to the above entitled action that the said action may be transferred from the Southern District of California, Southern Division, to the Southern District of California, Central Division, and that the trial and all further proceedings in the above entitled action may be had in the Central Division at Los Angeles, California.

CLARK J. MILLIRON,
Attorney for Plaintiffs.

WM. FLEET PALMER
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant.

Approved:

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Oct. 21, 1941. [30]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Plaintiff and the Defendant, by their respective attorneys, that the facts as hereinafter stated shall be taken as true, and that either party may prove such additional facts as are relevant and material and not inconsistent with those hereby stipulated.

That Austen G. Brown and Marion Brown Kenyon, the Executors of the Estate of Frederick L. Brown, Deceased, who died August 8, 1934, duly filed an estate tax return with the Collector of Internal Revenue at San Diego, California, on June 10, 1935, in which said return they showed no estate tax to be due. Thereafter an Internal Revenue Agent made an examination and valuation of the assets of the estate and made certain changes in the various items therein. In the revaluation of the estate and acting upon said report, the Commissioner of Internal Revenue determined that 31% of 130 $\frac{1}{4}$ shares of Gardena Syndicate, amounting to \$142,552.05, should be added to the gross estate.

The decedent during his lifetime and on the 15th day of [31] August, 1923, transferred to Frederick L. Brown, F. Walton Brown and Austen G. Brown, as trustees, 130 $\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a California corporation, by an instrument in writing, a copy of which is attached hereto and marked Exhibit "A".

That said indenture was in full force and effect at the time of the death of said Frederick L. Brown. That the entire tax for which refund is claimed by the Executors resulted from the inclusion in the gross estate of said decedent of the sum of \$142,-552.05 as the value of said 31% of said 130 $\frac{1}{4}$ shares of Gardena Syndicate stock transferred in trust under the conditions specified in said Exhibit "A". Without the inclusion of said stock the estate of said decedent was not of sufficient value to subject it to estate tax.

Dated: October 27, 1941.

CLARK J. MILLIRON,
Attorney for Plaintiffs.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant.

[Here follows Exhibit A "Trust Indenture, dated August 15, 1923", which is fully set out on pages 19 to 27, inclusive.]

[Endorsed]: Filed Oct. 28, 1941. [32]

[Title of District Court and Cause.]

MINUTE ORDER AND MEMORANDUM DECISION

The above-entitled cause was heard upon the issues raised by the Complaint and the Answer thereto. The Court having heard the testimony, oral and documentary, and the cause having been submitted to the Court for decision, and the Court having considered the agreed statement of facts and the evidence and the law in the case and the arguments of counsel, now finds in favor of the plaintiffs and orders judgment that Plaintiffs do have and recover of the defendant the sum of \$9534.50, with interest thereon at the rate of six per cent per annum from March 1, 1937, and for costs herein.

The Court is of the view that 31 per cent of the 130 $\frac{1}{4}$ shares of Gardena Syndicate valued at \$142,552.05 should not have been included in the gross estate of Frederick L. Brown. The indenture of August 15, 1923, was a valid trust estate which conveyed irrevocably the estate to the trustees. The retention of a life income by the trustor did not prevent the estate from vesting so as to exclude it from the estate of Frederick L. Brown at the time of his death.

I have studied very carefully the cases relied on by the Government. (*Helvering v. Hallock*, 1940, 309 U. S. 106; *Commissioner of Internal Revenue v. Clise*, 9 Cir., 1941, #9652, and *Estate of Mary M. Hughes*, 1941, 44 B. T. A. #184). The Board of Tax Appeals in the majority opinion just cited assumes that *Helvering v. Hallock* overrules *May v. Heiner*, 1930, 281 U. S. 231. Important cases of [39] recent origin are not to be considered overruled by implication. Overruling by implication is no more favored than repealing by implication. And certainly, if Mr. Justice Frankfurter, who wrote the opinion and distinctly repudiated cases he considered inconsistent with the ruling the Court was about to make, had felt that *May v. Heiner*, *supra*, required either rationalization or outright repudiation, he would have said so. The fact that he did not is proof that that case stands unshaken.

And, as recently as 1938, the Court followed it in *Hassett v. Welch*, 1938, 303 U. S. 303.

Logically I cannot see how it is in any way impaired by that case. It is also significant that our own Ninth Circuit does not mention the case in *Commissioner v. Clise*, *supra*. And I find no warrant for the intimation of the majority of the Board of Tax Appeals in *Estate of Mary M. Hughes*, *supra*, that the *Hallock* case repudiated the *May v. Heiner* case. The *May* case can be defended both in the light of logic and legal experience. It recognizes trust estates which have been used for many years to vest title to property in others, the trustor

retaining a limited life interest. When they are made absolutely and without the retention of a power to revoke, they are given full recognition in taxation cases because title to the corpus passes out of the trustor irrevocably. (See my opinion in *Nicholson v. United States*, 1938, 25 Fed Sup 424) which was decided prior to the *Hallock* case and was followed by Judge Sweeney of the District Court of Massachusetts in *Terhune v. Welch*, 39 Fed Supp 434, decided on June 19, 1941). The Circuit Court of Appeals for the Third Circuit in *Commissioner v. Kellogg*, 119 F (2) 54, decided on March 20, 1941, also takes the view that trusts of the kind under consideration here and in *May v. Heiner*, *supra*, are not affected by the decision in the *Hallock* case.

Hence the decision above noted.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 8.

Dated this 1st day of November, 1941.

[Endorsed]: Filed Nov. 1, 1941. [40]

[Title of District Court and Cause.]

OBJECTIONS TO FORM OF CONCLUSIONS OF LAW

Comes now the attorneys for the defendant, United States of America, and acknowledging receipt of a copy of plaintiff's proposed Findings of Fact and Conclusions of Law as of November 12, 1941, make the following objections thereto:

I.

That plaintiff's proposed Conclusions of Law No. I is compound and should be rendered simple by stating it in the form of two Conclusions of Law as follows: [41]

“I

“That said trust was not created in contemplation of death.

“II

“That said transfer in trust was not intended to take effect in possession or enjoyment at or after death.”

II.

Plaintiff's Conclusions of Law are incomplete for the reason they do not contain a conclusion that “there was (or was not) a possibility that the corpus of said trust would revert to the grantor or to his estate in the event that the named beneficiaries predeceased him.”

Dated: November 13, 1941.

WM. FLEET PALMER,

United States Attorney.

E. H. MITCHELL,

Asst. U. S. Attorney.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 13, 1941. [42]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

The above entitled action came on regularly for trial on October 28, 1941, on the Complaint and Answer, before the Court sitting without a jury, plaintiff appearing by Clark J. Milliron, and the defendant appearing by Wm. Fleet Palmer, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue; and evidence having been taken in part by stipulated facts and in part by oral and documentary evidence, and the matter having been duly submitted to the Court for decision, and the Court having considered the evidence and having rendered its decision in writing, makes the following Findings of Fact:

FINDINGS OF FACT.

The Court finds:

I.

That the plaintiffs, Austen G. Brown and Marian B. Kenyon, are, and at all times mentioned herein were, the duly appointed, qualified and acting Executors of the last Will and [43] Testament of Frederick L. Brown, deceased, who died on the 8th day of August, 1934, and bring this action in their capacity as such Executors.

II.

That on the 15th day of August, 1923, the afore-said Frederick L. Brown, deceased, and his wife, Marian M. Brown, deceased, by an instrument in writing, created a certain trust whereby $130\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, were transferred and delivered to Frederick L. Brown, F. Walton Brown and Austen G. Brown, or the successors of them, as trustees, and whereby said Frederick L. Brown transferred all his right, title and interest in and to said $130\frac{1}{4}$ shares of said stock to said trustees, and retained no right, title or interest in or to, or control over, said shares of stock or any thereof in said Frederick L. Brown, or said Marian M. Brown. That said trust was an irrevocable trust, providing that certain amounts of money were to be paid to the trustors, certain amounts were to accumulate and certain amounts were to be paid to other beneficiaries; said trust to terminate on the death of said Frederick L. Brown and said Marian M. Brown.

III.

That said trust was never revoked or modified and was in full force and effect at the time of the death of said Frederick L. Brown on August 8, 1934, and that said trust terminated according to its terms on February 8, 1940, on the death of said Marian M. Brown.

IV.

That no right of alteration or amendment, or other right of revocation or control was retained by Frederick L. Brown, deceased, or his said wife, Marian M. Brown, deceased, either alone [44] or with any other person.

V.

That the aforesaid 130 $\frac{1}{4}$ shares of Gardena Syndicate were acquired by Frederick L. Brown about the year 1906. In the year 1915 an oil well was being drilled near the property owned by Gardena Syndicate and said Frederick L. Brown, at that time, indicated a desire, if oil were ever discovered on the Gardena Syndicate property, to divide the stock with his wife and three children. That in the year 1922 said Gardena Syndicate entered into a lease for the drilling of an oil well on its property and said Frederick L. Brown again expressed a desire to divide said stock with his wife and children.

That the said children were unwilling to accept a gift of said stock from the said Frederick L. Brown, deceased, unless a substantial income to the said decedent and his wife was in some manner assured during the period of oil production.

VI.

That on August 15, 1923, the aforesaid trust was created in pursuance of the aforesaid desires of said Frederick L. Brown. At the time of the execution of said trust agreement, on August 15, 1923.

said Frederick L. Brown, deceased, was in excellent health and was of the age of about 56 years, and that he survived the execution of said lease by approximately eleven years.

VII.

That said trust indenture provided that the first \$30,000.00 income received was to be paid to said Frederick L. Brown, deceased, and in addition thereto he should receive from the income of said trust the sum of \$500.00 per month during his lifetime; that his wife, Marian M. Brown, should receive from said trust the sum of \$500.00 per month during her lifetime, and in addition to said amounts the said Frederick L. Brown, deceased, was [45] to receive one-fifth ($1/5$) of any income in excess of said amounts, and that on the death of either Frederick L. Brown, or Marian M. Brown, the survivor of them would receive a further sum of \$500.00 per month out of the income of said trust. The trust further provided that the sum of \$12,000.00 should be accumulated out of the income for the purpose of assuring the aforesaid payments. The balance of the income of said trust was to be paid to other beneficiaries named in said trust.

VIII.

That on June 10, 1935, the plaintiffs herein as Executors of the last Will and Testament of said Frederick L. Brown, deceased, duly filed an estate tax return with the Collector of Internal Revenue

of the Sixth District of California, which said return disclosed no estate tax whatsoever to be due.

IX.

That thereafter the United States of America, through the Commissioner of Internal Revenue, determined the total value of the gross estate to be the sum of \$189,552.82, and included in said value the sum of \$142,552.05 as the value of 31% of said 130 $\frac{1}{4}$ shares of stock of Gardena Syndicate transferred in trust, as aforesaid, on the grounds that said stock should be included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended.

X.

That the Commissioner determined that there was due from the plaintiffs the sum of \$8,735.70 tax and \$798.90 interest, a total of tax and interest in the amount of \$9,534.60, and that thereafter, on demand of the Collector of Internal Revenue of the Sixth District of California, the plaintiffs herein, on March 1, 1937, paid to said Collector of Internal Revenue said sum of \$9,534.60. [46]

XI.

That without the inclusion of the value of said stock in the estate of said decedent said estate was not of sufficient value to subject it to estate tax.

XII.

That no part of the value of said trust estate

was a part of the gross estate of said Frederick L. Brown, deceased.

XIII.

That on December 15, 1939, the plaintiffs duly filed a claim for refund of said estate tax and interest in the sum of \$9,534.00.

XIV.

That on April 1, 1940, the Commissioner of Internal Revenue rejected said claim for refund.

XV.

That no part of said tax has ever been repaid, refunded, credited or otherwise made available to plaintiffs herein.

CONCLUSIONS OF LAW.

As Conclusions of Law, from the foregoing facts, the Court concludes as follows:

I.

That said trust was not created in contemplation of and was not intended to take effect in possession or enjoyment at or after death.

II.

That 31% of said 130¼ shares of Gardena Syndicate, transferred in trust and valued at \$142,552.05, was not a part of the estate of Frederick L. Brown, and should not have been included in the gross estate of said Frederick L. Brown, deceased. [47]

III.

That the indenture of trust, dated August 15, 1923, was a valid trust estate which conveyed the estate irrevocably to the Trustees.

IV.

That the retention of a life income by the trustor did not prevent the estate from vesting in the trustees, and no part of the trust estate was taxable as a part of the estate of said Frederick L. Brown, deceased.

V.

That no estate tax was due from the plaintiffs herein.

VI.

That the aforesaid estate tax was paid to the Collector of Internal Revenue for the Sixth District of California on March 1, 1937, in the amount of \$8,735.70 tax and \$798.90 interest, a total of \$9,534.60, which said amount was wrongfully and illegally assessed and collected.

VII.

That plaintiffs are entitled to Judgment as prayed sum of \$9,534.60 with interest from March 1, 1937.

VIII.

That plaintiffs are entitled to Judgment as prayed for in the Complaint.

Let Judgment be entered accordingly.

Dated: November 25th, 1941.

LEON R. YANKWICH,
Judge.

Approved as to form, as provided by Rule 8.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By
Attorneys for Defendant.

[Endorsed]: Filed Nov. 25, 1941. [48]

In the District Court of the United States
Southern District of California
Central Division.

At Law No. 1400-Y

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FRED-
ERICK L. BROWN, Deceased,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled action came on to be heard on the 28th day of October, 1941, before the Court sitting without a jury, plaintiff appearing by Clark J. Milliron, and defendant appearing by Wm. Fleet Palmer, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and said action having been tried upon the Complaint and Answer, upon Stipulation of Facts, and oral and documentary evidence, and the matters having been duly submitted to the Court for its decision, and the Court having considered the evidence and having rendered its decision in writing, and the Court having made written Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs, Austen G. Brown and Marian B. Kenyon, Executors of the Estate of Frederick L. Brown, deceased, do hereby have and recover of and from the defendant, The United States of America, [49] the sum of \$9,534.40, together with interest thereon at the rate of six per cent per annum from March 1, 1937, making a total of \$....., and for costs of suit herein incurred in the sum of \$.....

Dated this 24th day of November, 1941.

LEON R. YANKWICH,

Judge.

Approved as to form, as provided by Rule 8.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Assistant United States

Attorney,

ARMOND MONROE JEWELL,

Assistant United States

Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of

Internal Revenue,

By

Attorneys for Defendant.

[Endorsed]: Filed and Entered Nov. 25, 1941.

[50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on November 25, 1941.

Dated: February 25, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Defendant.

Mailed copy to Atty. for Plfs. E. L. S.

[Endorsed]: Filed Feb. 25, 1942. [51]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE ON APPEAL.

It Is Hereby Stipulated by and between the parties hereto that the time of the defendant and appellant, United States of America, to file the record on appeal with the Circuit Court of Appeals for

the Ninth Circuit and docket the action therein may be, by the order of any Judge of the above entitled District Court, extended to and including the 26th day of May, 1942. [52]

Dated: March 27, 1942.

CLARK J. MILLIRON

Attorney for Plaintiffs.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant.

It Is So Ordered this 3 day of Apr., 1942.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Apr. 3, 1942. [53]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL AND FOR PREPA-
RATION OF RECORD ON APPEAL.

Good cause appearing therefor, It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the

Ninth Circuit be, and the same hereby, is extended to and including July 20, 1942.

Dated: This 22 day of May, 1942.

FRANCIS A. GARRECHT

Judge of the United States
Circuit Court of Appeal.

[Endorsed]: Filed May 25, 1942. [54]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL

1. That the District Court erred in holding that the value of thirty-one per cent of the corpus of the irrevocable trust created by Frederick L. Brown, the decedent, on August 15, 1923, should be excluded from his gross estate upon his death in the year 1934, within the meaning of the provisions of Section 302(c) of the Revenue Act of 1926.

Dated: This 26th day of May, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant-
Appellant.

[Endorsed]: Filed May 27, 1942. [55]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS ON RECORD OF APPEAL

To the Clerk of the District Court of the United
States for the Southern District of California,
Central Division:

You are hereby requested to include the following
in the Record on Appeal herein:

1. The Complaint, together with the exhibits attached thereto;
2. Answer filed May 15, 1941;
3. Stipulation Transferring Proceeding to Central Division for trial; [56]
4. Stipulation of Facts filed at the trial of the case;
5. Minute Order and Memorandum Decision of District Court in favor of the Plaintiffs handed down November 1, 1941;
6. Defendant's Objections to Form of Proposed Conclusions of Law;
7. Court's Findings of Fact and Conclusions of Law dated November 25, 1941;
8. Judgment entered November 25, 1941;
9. Notice of Appeal filed February 25, 1941;
10. Stipulation and Order Extending Time to Docket Cause on Appeal to May 26, 1942;
11. Order Extending Time to Docket Cause on Appeal until July 20, 1942;
12. Designation of Points to be Relied upon on Appeal;

13. This Designation of the Contents of the Record upon Appeal;
14. Clerk's Certificate.

This transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and is to be filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, California.

Dated: This 26th day of May, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant-
Appellant.

[Endorsed]: Filed May 27, 1942. [57]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PARTS
OF RECORD BY APPELLEE.

To the Clerk:

Appellee designates the following additional parts of the record which he considers material:

The Reporter's Transcript of the testimony of F. Walton Brown, offered and received in the case.

Dated June 3, 1942.

CLARK J. MILLIRON,
Attorney for Appellee

The undersigned hereby acknowledges service of a copy of [58] the foregoing Designation of Additional Parts of the Record.

WM. FLEET PALMER,
United States Attorney;
E. H. MITCHELL,
Asst. U. S. Attorney, and
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE
Attorneys for Appellant.

[Endorsed]: Filed Jan. 3, 1942. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain full, true and correct copies of Complaint; Answer; Stipulation and Order Transferring Proceeding to Central Division; Stipulation of Facts; Minute Order and Memorandum Decision; Objections to Form of Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation Extending Time to File Record and Docket Cause on Appeal; Order Extending Time to Docket Cause on Appeal and for Preparation of Record on Appeal; Appellant's Statement of Points to be urged upon Appeal; Appellant's Designation of Contents of Record on Appeal; and Designation of Additional Parts of Record by Appellee, which together with the Original Reporter's Transcript transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 2 day of July, A. D. 1942.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE,

Deputy

TESTIMONY

The Witness: F. Walton Brown.

Direct Examination

By Mr. Milliron:

Q. What is your occupation, Mr. Brown?

A. I am an attorney.

Q. You were the attorney who drew trustee indenture, which is an exhibit in this case?

A. I did.

Q. Will you state when the matter of the transfer of the property from your father was first taken up with [3*] you?

A. Well, it is a long story. My father owned that stock in Gardena,—he owned that stock in the Gardena Syndicate from sometime in 1906 and the property was down here on Dominguez Hill.

We used to go down there to that property in the early days. There was an old sump on there that had some sulphur water in it which was believed to be an indication of oil on the property.

Then along in 1911 or 1912 or 1913,—I cannot give the exact date—a company started drilling an oil well on property near this property, and then the excitement was high.

Everybody hoped there would be oil on this Gardena Syndicate property. At that time I went down there a number of times with my father and we talked over the situation and he said at that time if he made any money out of the oil from that property, that he would divide it with my mother and the children.

*Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of F. Walton Brown.)

That well was not productive, and for a long time nothing happened in the way of oil development down there, but in 1921 or 1922 a lease of the property was made to the Union Oil Company or was rather made to the Burnham Exploration Company and the Union Oil Company developed it.

They drilled a well which came in sometime in—shortly before this trust indenture was made. When the oil well [4] came in, my father said that he wanted to carry out his previous statements that if any money came in out of the well, he wanted to divide it with the children.

He stated that he would give one-fifth of the stock he owned in the Gardena Syndicate to my mother, and one-fifth to my brother and one-fifth to my sister and one-fifth to himself and one-fifth to me. He retained one-fifth himself.

That was discussed both down where he lived with my mother, brother and sister and myself, and also he came up here quite frequently and it was also discussed with me many times.

The three children all said they would not be willing to accept such a gift because the extent of the oil there was uncertain and it might not last, and we did not feel that father and mother ought to give away the property without retaining in some way an income which would provide for them as long as they lived.

So my father asked me for my suggestion and I suggested this trust arrangement by which a provi-

(Testimony of F. Walton Brown.)

sion was made for income to him for life and a part of the income to the children, and then upon the death of himself and my mother the property would go to the children.

With that in view, I drew the trust indenture. It was discussed among all the family and they all said they felt it carried out that idea and the trust indenture was signed up and the property was transferred to the trustees. [5]

Q. What was the condition of your father's health in 1923 when this trust indenture was drawn?

A. It was very good.

The Court: He lived how many years after?

The Witness: I think it was eleven; he died in 1934.

The Court: This was drawn up in 1923?

The Witness: Yes.

The Court: August 23rd, and he died in August of 1934?

The Witness: Yes.

By Mr. Milliron:

Q. At the time this trust indenture was drawn, I might say, you were one of the trustees?

A. That is right.

Q. Named in this? A. Yes.

Q. And also one of the beneficiaries?

A. Yes.

Q. At the time this trust indenture was drawn, it provided for a life estate to your father, your mother and the three children?

(Testimony of F. Walton Brown.)

By Mr. Milliron:

Q. At that time, what persons were living? Who were [6] the prospective heirs under this trust, the prospective beneficiaries under this trust who were still living at the death of your father?

A. Well, my sister and brother and myself and my mother were all living. There were two, three, five, eight grandchildren then living.

At the time the trust indenture was entered into, there were only five grandchildren.

Q. Three grandchildren were born after the trust indenture was written?

A. Yes. No, I am wrong. There were only seven and not eight.

Mr. Milliron: That is all.

Mr. Harpole: No cross examination.

The Court: There is no cross examination?

Mr. Harpole: No.

The Court: Had any discussions been had before this oil prospecting began to materialize?

The Witness: I didn't hear you, your Honor.

The Court: Had any definite discussions been had between yourself and your father before the definite prospect of oil discovery materialized?

The Witness: We never discussed the details of how the matter would be arranged, but beginning before 1912 and 1913 he said to me if he got any money out of oil on that property he would divide it with the children. That was [7] about the extent of our discussion.

(Testimony of F. Walton Brown.)

The Court: All the children were adults at the time?

The Witness: The children were all adults at that time, yes.

The Court: Of course, you were not dependent upon your father?

The Witness: No, we were not dependent upon him, although he always helped us and was generous before that.

The Court: And how old was your father at the time this indenture was made in 1923?

The Witness: Fifty-six years old.

The Court: Fifty-six?

The Witness: Yes.

The Court: He died at the age of sixty-six?

The Witness: Sixty-seven.

The Court: Sixty-seven?

The Witness: Yes, sir.

The Court: All right.

Mr. Milliron: That is all, if the Court please. We have no further evidence.

The Court: Does the Government desire to present any evidence?

Mr. Harpole: No other evidence other than the stipulation that has been introduced by the plaintiffs.

[Endorsed]: Filed July 3, 1942. [8]

[Endorsed]: No. 10185. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Austen G. Brown and Marian B. Kenyon, Executors of the Estate of Frederick L. Brown, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 3, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Received copy of the within Appellant's statement of points to be urged upon appeal this 1st day of July, 1942.

CLARK J. MILLIRON

Attorney for Appellee.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10185

UNITED STATES OF AMERICA,
Appellant,
vs.

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDERICK
L. BROWN, Deceased,
Appellee.

APPELLANT'S STATEMENT OF POINTS
TO BE URGED UPON APPEAL.

1. That the District Court erred in holding that the value of thirty-one per cent of the corpus of the irrevocable trust created by Frederick L. Brown, the decedent, on August 15, 1923, should be excluded from his gross estate upon his death in the year 1934, within the meaning of the provisions of Section 302(c) of the Revenue Act of 1926.

Dated: This 1st day of July, 1942.

WM. FLEET PALMER,
United States Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant-
Appellant.
Federal Building,
Los Angeles, California.

[Endorsed]: Filed July 3, 1942.

No. 10185

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors
of the Estate of FREDERICK L. BROWN, Deceased,

Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

Assistant Attorney General,

SEWALL KEY,

GERALD L. WALLACE,

L. W. POST,

Special Assistants to the Attorney General,

LEO V. SILVERSTEIN,

United States Attorney,

E. H. MITCHELL,

Assistant United States Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue.

United States Post Office and Court House
Building, Los Angeles,

FILED

SEP 16 1940

PAUL P. O'BRIEN,



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No. 10185

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors
of the Estate of FREDERICK L. BROWN, Deceased,

Appellees.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinion of the District Court [minute order and memorandum decision, R. 41-43] is unreported.

Jurisdiction.

This is an action for the recovery of estate taxes paid. The complaint, filed February 13, 1941 [R. 1-35], alleges that the taxes were wrongfully exacted and that the claim for refund, filed December 15, 1939, was rejected on April 1, 1940 [R. 7-8]; also, that the action is brought under Section 24 (20) of the Judicial Code, as amended (U. S. C., Title 28. Sec. 41 (20)). [R. 2.] The case is brought to this Court by notice of appeal filed February

25, 1942 [R. 55], from the judgment of the District Court entered November 25, 1941. [R. 53-54.] The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended (U. S. C., Title 28, Sec. 225).

Question Presented.

In 1923 the decedent created an irrevocable trust, providing for distribution of the income in varying proportions to himself and family. During his lifetime, the decedent actually received 31 per cent of the total trust income. The trust was to terminate upon the death of the survivor of the decedent and his wife, whereupon the corpus was to vest absolutely in equal shares in their children, if living. If any child should then be dead, his share was to vest in his issue and/or spouse in stated proportions, and in default of issue or spouse the share would vest as if that child had not been named as a remainderman. The decedent died in 1934. The question is whether 31 per cent of the value of the trust corpus is includible in the gross estate as a transfer intended to take effect in possession or enjoyment at or after death under Section 302 (c) of the Revenue Act of 1926.

Statute and Regulations Involved.

The pertinent statutory provisions are set forth and the regulations are mentioned in the appendix, *infra*, pages 13 to 18.

Statement.

The case was tried without a jury. [R. 45.] A stipulation of facts was filed [R. 39-40, 45] and oral and documentary evidence was also received. [R. 45, 62-66.] Thereafter the District Court rendered its decision in writing [R. 41-43, 45], with special findings of fact and conclusions of law. [R. 45-51.] Judgment was entered for the taxpayers in the principal sum of \$9,534.40 [R. 53-54], from which the defendant took this appeal.

The facts are undisputed. So far as material, they may be summarized as follows [R. 13-27, 39-40, 45-50]:

The taxpayers are the executors of the last will and testament of Frederick L. Brown, who died on the 8th day of August, 1934, at the age of 67 years. On August 15, 1923, the decedent and his wife, who is now also deceased, created an irrevocable trust whereby he transferred to himself and their two sons (Walton Brown and Austen G. Brown) as trustees, 130¼ shares of capital stock of Gardena Syndicate, then owned by the decedent. [R. 45-48.]

The trust indenture provided that the decedent should receive the first \$30,000 of the trust income. Thereafter, the trustees were to pay him during his life \$500 per month out of income. A similar monthly income was then to be paid to his wife. Subject to an accumulation to secure the foregoing payments, the balance of the income was distributable mainly to their three children. [R. 21-23, 48.] In accordance with these provisions of the

trust agreement, the decedent actually received during his lifetime 31 per cent of the total trust income. [R. 14-15.]

The trust was to terminate upon the death of the survivor of the decedent and his wife. Thereupon, the corpus was to vest absolutely in equal shares in their children, if living. If any child should then be dead, his share was to vest in his issue and spouse in stated proportions. In default of issue or spouse the share would vest as if that child had not been named as a remainderman. [R. 24-25.]

No right of alteration or amendment, or other right of revocation or control was retained by the decedent or his wife, either alone or with any other person. The trust was in full force at the time of the decedent's death in 1934. It terminated according to its terms upon the death of the wife, on February 8, 1940. [R. 46-47.]

The estate tax return filed by the executors in 1935 with the Collector of Internal Revenue for the Sixth District of California, disclosed no estate tax to be due. The Commissioner of Internal Revenue thereafter determined a deficiency in the estate tax of \$9,534.60, with interest. This resulted from the inclusion in the gross estate of the value (\$142,552.05) of 31 per cent of the 130¼ shares of stock of the Gardena Syndicate, which the decedent had transferred in trust in 1923. The Commissioner's action was based upon Section 302 (c) of the Revenue Act of 1926, as amended. [R. 48-49.]

In April of 1940 the Commissioner rejected a claim for refund filed the preceding December. This suit was then filed, and resulted in a judgment in favor of the taxpayers.

The District Court concluded that the decedent had not made a transfer intended to take effect in possession or enjoyment at or after death. The United States thereupon took this appeal. [R. 49-50.]

Statement of Points to Be Urged.

The court below erred (1) in holding that the value of 31 per cent of the corpus of the trust created by the decedent in 1923, was not includible in his gross estate under Section 302 (c) of the Revenue Act of 1926; (2) in entering judgment for the taxpayers in the principal sum of \$9,534.40.

Summary of Argument.

The decedent made a transfer by trust which was intended to take effect in possession or enjoyment at or after his death, within the meaning of Section 302 (c) of the Revenue Act of 1926. This is true because the rights of the remaindermen were in fact contingent upon their surviving the decedent. Thus, the ultimate disposition of the corpus of the trust was suspended during the lifetime of the decedent.

Moreover, at least 31 per cent of the trust corpus is includible in the gross estate under Section 302 (c), because the decedent received that portion of the trust income during his lifetime, pursuant to an express reservation in the trust indenture. Such a reservation is sufficient in itself to justify the conclusion that the transfer was intended to take effect at death.

In any event, the validity of the foregoing conclusion becomes apparent when the provisions of the trust indenture are considered as a whole.

ARGUMENT.

The Decedent Made a Transfer by Trust Which Was Intended to Take Effect in Possession or Enjoyment at or After His Death.

The only issue in this case is whether, by the trust created in 1923, the decedent made a transfer intended to take effect in possession or enjoyment at or after his death, within the meaning of Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9. [Appendix, *infra*, p. 13.] In contending that he did make such a transfer, we rely upon the trust provisions for disposition of corpus, and for the reservation to the decedent of a life interest in a substantial portion of the trust income. Either provision is sufficient in itself to justify inclusion in the gross estate of 31 per cent of the value of the trust corpus.¹ In any event, the two combined show clearly that the decedent made a transfer intended to take effect at death.

a. THE ULTIMATE DISPOSITION OF THE TRUST CORPUS WAS SUSPENDED DURING THE LIFETIME OF THE DECEDENT.

The trust created in 1923 was to terminate upon the death of the survivor of the decedent and his wife. "Thereupon," the indenture provides, "the title to said trust property shall vest absolutely in equal shares in" the three children, if living. Thus, it is apparent that the ultimate disposition of the corpus of the trust was suspended during the lifetime of the decedent.

¹In determining the deficiency, the Commissioner included only 31 per cent of the corpus because that represented the portion of the trust income which the decedent received during his lifetime. The entire corpus would properly be includible if we are right in our first argument. However, no increased deficiency has been asserted.

The statute couples transfers intended to take effect at death with transfers made in contemplation of death, and evinces an intention to treat them alike. It was clearly designed to reach substitutes for testamentary dispositions and thus to prevent evasion of the estate tax. (*United States v. Wells*, 283 U. S. 102, 116-117.) We submit that the instant transfer was a substitute for a testamentary disposition in a very real sense since it provided for the distribution of the bulk of the grantor's property after his death.²

We are not obliged to maintain that there was a "transfer" of the trust property from the decedent to others at his death. *Tyler v. United States*, 281 U. S. 497, 502; *United States v. Jacobs*, 306 U. S. 363, 367, rehearing denied, 306 U. S. 620. The statute contemplates the inclusion of property donatively transferred where the possession or enjoyment of the ultimate taker is deferred until at or after the donor's death (*cf. Helvering v. Hutchings*, 312 U. S. 393; *United States v. Pelzer*, 312 U. S. 399; *Ryerson v. United States*, 312 U. S. 405). This is clearly such a case because the rights of the remaindermen were in fact contingent at all times during the lifetime of the survivor of the grantor and his wife. In other words, the rights of the remaindermen could not become indefeasibly fixed until at or after the grantor's death.

²It is immaterial that there may have been completed gifts upon the creation of the trust. *Hughes v. Commissioner*, 104 F. (2d) 144 (C. C. A. 9th); *Herzog v. Commissioner*, 116 F. (2d) 591 (C. C. A. 2d). The same is true of gifts in contemplation of death. Nevertheless, such gifts are subject to estate tax when the donor dies. *Fish v. Helvering*, 75 F. (2d) 769 (App. D. C.). See *Estate of Sanford v. Commissioner*, 308 U. S. 39, 45; *Herzog v. Commissioner*, *supra*, p. 595. No gift tax was paid on the instant transfer, because the trust was created prior to adoption of the first gift tax law in 1924.

Our view is supported by *Helvering v. Hallock*, 309 U. S. 106. The decedent had there created a trust to pay the income to his wife for life and upon her death to deliver the principal to the grantor, if living. If he should not then be living, the property was to go to his children. The grantor predeceased his wife and the Court held that the value of his interest³ was properly includible in the gross estate as a transfer intended to take effect at or after death. In so holding, the Court expressly overruled its own prior decisions in the *St. Louis Trust Co.* cases (*Helvering v. St. Louis Trust Co.*, 296 U. S. 39; *Becker v. St. Louis Trust Co.*, 296 U. S. 48) and said (pp. 110-111):

Whether the transfer made by the decedent in his lifetime is "intended to take effect in possession or enjoyment at or after his death" by reason of that which he retained, is the crux of the problem. We must put to one side questions that arise under sections of the estate tax law other than Section 302 (c) —sections, that is, relating to transfers taking place at death. Section 302 (c) deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.

In the instant case there was a possibility of reverter, remote though it may have been, and the eventual dispo-

³The Commissioner did not attempt to include the value of the entire corpus but deducted therefrom the value of the wife's outstanding life interest. Under the rationale of the Court's decision, it is believed that the entire value could have been included and that the court in *Central Nat. Bank of Cleveland v. United States*, 41 F. Supp. 239 (C. Cls.) erred (p. 248) in concluding to the contrary.

sition of the property under the deed of trust was fixed with reference to the decedent's death. The gifts to the remaindermen did not and could not take effect in possession or enjoyment until at or after the happening of that event.

The *Hallock* case has not been restricted to its precise facts. It has been applied in other cases presenting analogous situations. Some of these cases are as follows: *Commissioner v. Clise*, 122 F. (2d) 998 (C. C. A. 9th), certiorari denied, March 30, 1942; *Commissioner v. Wilder's Estate*, 118 F. (2d) 281 (C. C. A. 5th), certiorari denied, 314 U. S. 634; *Chase Nat. Bank v. United States*, 116 F. (2d) 625 (C. C. A. 2d); *Commissioner v. Washer*, 127 F. (2d) 446 (C. C. A. 6th), petition for certiorari pending; *Van Vranken v. Helvering*, 115 F. (2d) 709 (C. C. A. 2d), certiorari denied, 313 U. S. 585; *Chase Nat. Bank of City of New York v. Higgins*, 38 F. Supp. 858 (S. D. N. Y.). Cf. also *Helvering v. Le Gierse*, 312 U. S. 531. On the other hand, the court in *Commissioner v. Kellogg*, 119 F. (2d) 54 (C. C. A. 3d), gave the *Hallock* case a narrow interpretation. However, we submit that the *Kellogg* case was incorrectly decided.

For the foregoing reasons, we maintain that the instant transfer is taxable under Section 302 (c).

b. THE TRANSFER WAS INTENDED TO TAKE EFFECT AT DEATH TO THE EXTENT THAT THE DECEDENT RESERVED A LIFE INTEREST IN THE TRUST INCOME.

In advancing this alternative contention based upon the decedent's reservation of a life interest in a substantial part of the trust income, we are not unmindful of the decision of the Supreme Court in *Hassett v. Welch*, 303 U. S. 303. That case held that, notwithstanding Section

302 (h) of the Revenue Act of 1926, the 1931 and 1932 amendments to Section 302 (c) of that Act [Appendix, *infra*, p. 13] were not applicable to transfers made prior to the adoption of the amendments. Since the instant transfer was made in 1923, therefore, we are not relying upon those amendments although they provide expressly for the inclusion of trust property of which the grantor has reserved the income for life.

We now argue that, by reason of the reservation of income here, the decedent made a transfer intended to take effect in possession or enjoyment at his death, within the meaning of Section 302 (c) as it read before the amendments. This of course presents no question of retroactivity because this provision of Section 302 (c) was in effect when the trust was created in 1923,⁴ as well as in 1934 when the decedent died. The Supreme Court did not consider this issue in *Hassett v. Welch*, *supra*, but dealt exclusively with the claimed retroactive operation of the later amendments.

It seems clear that, at least to the extent of 31 per cent of the value of the trust corpus, the remaindermen came into possession and enjoyment of the property only upon the death of the decedent. In reserving that much of the income from the property, the decedent obviously retained the most substantial present incident of ownership. Assuming for this purpose that the remainder interests were "vested in title" (see argument under point a, *supra*), the transfer plainly did not take effect in possession or enjoyment so long as the decedent was receiving the income. This would seem to be one case which Sec-

⁴See Section 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 227.

tion 302 (c) in its original form was certainly intended to cover. See *Nichols v. Coolidge*, 274 U. S. 531, 542-543. The state courts have uniformly so held in construing identical provisions. See annotation in 100 A. L. R. 1244, 1248-1251.

It is true that the Supreme Court held to the contrary in *May v. Heiner*, 281 U. S. 238. But we believe that case is no longer the law in view of the later decision in *Helvering v. Hallock*, *supra*. Mr. Justice Roberts, dissenting in the *Hallock* case, so construed the majority opinion. Moreover, the Board of Tax Appeals has unequivocally so held in *Hughes v. Commissioner*, 44 B. T. A. 1196, where the facts are substantially the same as in the case at bar. See also, *Reynolds v. Commissioner*, 45 B. T. A. 44; *Fish v. Commissioner*, 45 B. T. A. 120.

We submit that the present position of the Board of Tax Appeals is correct, and that the court below therefore erred in its interpretation of the scope of the *Hallock* decision.

c. VIEWING THE INTERESTS RETAINED BY THE DECEDENT AS A WHOLE, THE TRANSFER TOOK EFFECT AT DEATH.

Experience with the doctrine of *Helvering v. Clifford*, 309 U. S. 331, demonstrates that the combination of several factors may result in tax consequences beyond those reached where one or more of the factors appears in isolation. That approach seems equally appropriate here. It is not necessary to consider the provisions of the trust indenture piecemeal.

While we believe that the tax here can be sustained upon either of the grounds advanced above, when the interests

retained by the decedent are viewed as a whole, it seems plain that he made a transfer intended to take effect in possession or enjoyment at death. No child could have any assurance that a share of the corpus would vest in him until the death of the decedent and his wife. Moreover, in no event could the remainderman come into actual possession and enjoyment of that part of the property from which the decedent was receiving income until after his death. A consideration of these factors in combination, clearly leads to the conclusion that the decedent made a transfer falling within the statute.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General,

SEWALL KEY,

GERALD L. WALLACE,

L. W. POST,

Special Assistants to the Attorney General,

LEO V. SILVERSTEIN,
United States Attorney,

F. H. MITCHELL,
Assistant United States Attorney,

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.

September, 1942.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as originally enacted] (To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(c) [as amended by Joint Resolution of March 3, 1931, Public, No. 131, 71st Cong., and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. [To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Treasury Regulations 80 (1937 ed.):

ART. 15 [as amended by T. D. 5008, 1940-2 Cum. Bull. 286]. *Transfers during life*.—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see article 16); (2) transfers conditioned upon the decedent's death (see article 17); (3) transfers under which the decedent reserved or retained (in whole or in part) the use, possession, rents, or other income or enjoyment of the transferred property, for his life, or for a period not ascertainable without reference to his death, or for a period of such duration as to evidence an intention that it should extend to his death; including also the reservation or retention of the use, possession, rents, or other income, the actual enjoyment of which was to await the termination of a transferred precedent interest or estate (see article 18); * * *.

The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death, * * *. If a portion only of the property was so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate. * * *

* * * * *

ART. 17 [as amended by T. D. 5008, *supra*]. *Transfers conditioned upon survivorship*.—The statutory

phrase, “a transfer * * * intended to take effect in possession or enjoyment at or after his death,” includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money’s worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent’s death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent’s death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revert

in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering v. St. Louis Union Trust Co.* (296 U. S., 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)])) and *Becker v. St. Louis Union Trust Co.* (296 U. S., 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)])) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering v. Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. D. 1940-1, 223])), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein v. United States* (283 U. S., 231 [Ct. D. 333, C. B.

X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938-2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.* Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

with "disposition."

No. 10185

Haggan vs. Haggan, 308, 315

IN THE

13
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors
of the Estate of FREDERICK L. BROWN, Deceased,

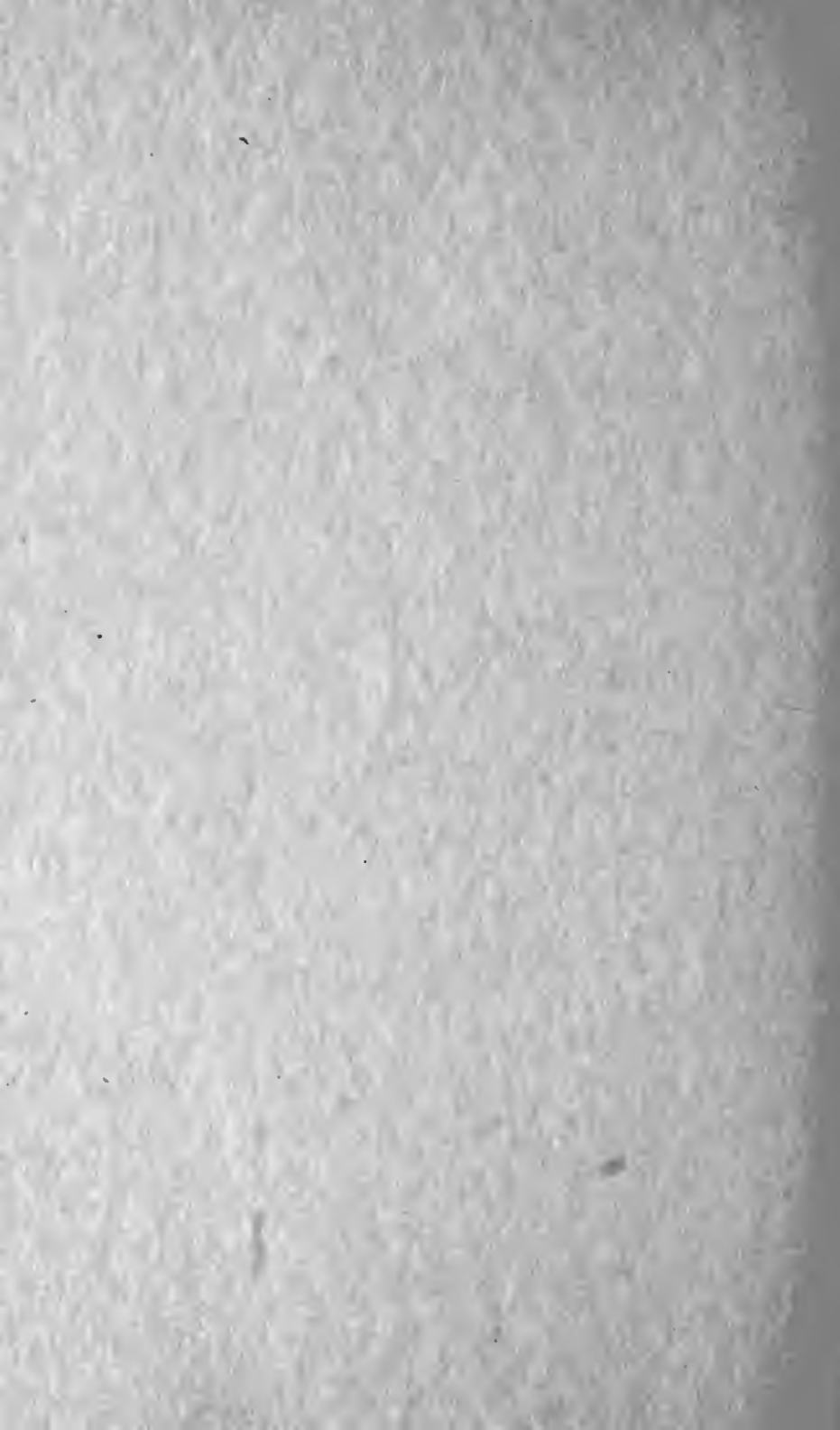
Appellees.

REPLY BRIEF OF APPELLEES.

CLARK J. MILLIRON,
518 Fidelity Building, Los Angeles,
Attorney for Appellee.

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No. 10185

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors
of the Estate of FREDERICK L. BROWN, Deceased,

Appellees.

REPLY BRIEF OF APPELLEES.

JURISDICTION.

This is an action for the recovery of estate taxes paid. The complaint, filed February 13, 1941 [R. 1-35], alleges that the taxes were wrongfully exacted and that the claim for refund, filed December 15, 1939, was rejected on April 1, 1940 [R. 7-8]; also, that the action is brought under Section 24 (20) of the Judicial Code, as amended. (U. S. C., Title 28, Sec. 41 (20).) [R. 2.] The case is brought to this Court by notice of appeal filed February 25, 1942 [R. 55], from the judgment of the District Court entered November 25, 1941. [R. 53-54.] The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended. (U. S. C., Title 28, Sec. 225.)

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether, under the provisions of Sec. 302(c) of the Revenue Act of 1926, any portion of the value of the corpus of an irrevocable trust created in 1923 was includable in the gross estate of the trustor who died in 1934, where the trust was not created in contemplation of death, and where the trustor retained no interest whatsoever in the corpus, nor any right or power to in any way alter or amend the trust or any of the terms thereof, and where the trustor made no provision whatsoever for any retention or reversion of any part of the corpus, but reserved only the right to receive a portion of the income therefrom during his life.

(2) Whether the retroactive application of the amendment of March 3, 1931, made to Section 302(c) of the Revenue Act of 1926, would be in violation of the Fifth Amendment of the Constitution of the United States.

STATUTE INVOLVED.

The statute involved is Section 302(c) of the Revenue Act of 1926. The text of this section so far as here applicable is set forth in the appendix hereto at page 59. Subsequent amendments to this section by the Joint Resolution of March 3, 1931, and by Section 803(a) of the Revenue Act of 1932 are also set forth in the appendix at page 60.

STATEMENT OF THE CASE.

The taxpayers are the executors of the last will and testament of Frederick L. Brown, who died on the 8th day of August, 1934, at the age of 67 years. On August 15, 1923, the decedent and his wife, who is now also deceased, having died in 1940, created an irrevocable trust whereby he transferred to himself and their two sons (Walton Brown and Austen G. Brown) as trustees, 130¼ shares of capital stock of Gardena Syndicate, then owned by the decedent. [R. 45-48.]

The trust indenture provided that the decedent should receive the first \$30,000 of the trust income. Thereafter, the trustees were to pay him during his life \$500 per month out of income. A similar monthly income was then to be paid to his wife. Subject to an accumulation to secure the foregoing payments, the balance of the income was distributable mainly to their three children. [R. 21-23, 48.] In accordance with these provisions of the trust agreement, the decedent actually received during his lifetime 31 per cent of the total trust income. [R. 14-15.]

The trust was to terminate upon the death of the survivor of the decedent and his wife. Thereupon, the corpus was to vest absolutely in equal shares in their children, if living, otherwise in the grandchildren or their issue. If any child should then be dead, his share was to vest in his issue and spouse in stated proportions. In default of issue or spouse the share would vest as if that child had not been named as a remainderman. [R. 24-25.]

No reversionary interest of any kind was reserved in the trust instrument.

No right of alteration or amendment, or other right of revocation or control was retained by the decedent or his wife, either alone or with any other person. The trust was in full force at the time of the decedent's death in 1934. It terminated according to its terms upon the death of the wife, on February 8, 1940. [R. 46-47.]

The estate tax return filed by the executors in 1935 with the Collector of Internal Revenue for the Sixth District of California, disclosed no estate tax to be due. The Commissioner of Internal Revenue thereafter determined a deficiency in the estate tax of \$9,534.60, including interest. This resulted from the inclusion in the gross estate of the value (\$142,552.05) of 31 per cent of the 130 $\frac{1}{4}$ shares of stock of the Gardena Syndicate, which the decedent had transferred in trust in 1923. The Commissioner's action was based upon Section 302(c) of the Revenue Act of 1926, as amended. [R. 48-49.] The executors paid the tax and interest on March 1, 1937.

In April, 1940, the Commissioner rejected a claim for refund filed the preceding December. This suit was then filed, and resulted in a judgment in favor of the taxpayers. The District Court concluded that the decedent had not made a transfer in contemplation of death or intended to take effect in possession or enjoyment at or after death. The United States thereupon took this appeal. [R. 49-50.]

SUMMARY OF ARGUMENT.

I. The issues in this case are controlled by the interpretation and application of Section 302(c) of the Revenue Act of 1926 as it stood prior to the amendment by the joint resolution of March 3, 1931.

II. The controlling principle of law announced and followed in a long line of Supreme Court decisions is that no part of the value of property transferred in trust prior to March 3, 1931, not in contemplation of death, is includable in gross estate under Section 302(c) of the Revenue Act of 1926 if such transfer was absolute and complete when made, even though the grantor reserved to himself the income from the property for life.

III. The transfer of the interest here involved was complete when made, and no part of the value of that interest is includable in the grantor's gross estate. The reservation by the grantor of a portion of the trust income for his life is of no significance inasmuch as Section 302(c) of the Revenue Act of 1926, as it read prior to the amendment of March 3, 1931, is controlling.

IV. The appellant's conclusions are not based upon facts and are not supported by the authorities cited.

ARGUMENT.

I.

The Issues in This Case Are Controlled by the Interpretation and Application of Section 302(c) of the Revenue Act of 1926 as It Stood Prior to the Amendment by the Joint Resolution of March 3, 1931.

Section 302(c) of the Revenue Act of 1926 [Appendix p. 59] provides, so far as here pertinent, that the value of a decedent's gross estate shall be determined by including the value at the time of death of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise intended to take effect in possession or enjoyment at or after his death.

That section was amended by the Joint Resolution of March 3, 1931 [Appendix p. 61], so as to enlarge the scope of 302(c) to include in gross estate the value of an interest in property transferred in trust when coupled with the retention by the grantor of the right to the income for his life. The substance of this amendment was subsequently incorporated in Sec. 803(a) of the Revenue Act of 1932 [Appendix p. 60]. These amendments, however, were prospective and not retroactive in their application. They do not apply to transfers completed prior to March 3, 1931.

The Joint Resolution was adopted because, on the preceding day, March 2, 1931, the Supreme Court had held in *Burnet v. Northern Trust Company*, 283 U. S. 782, 75 L. Ed. 1412, *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412, and *McCormick v. Burnet*, 283 U. S. 784,

75 L. Ed. 1413, that the transfer of property in trust coupled with a reservation of income to the grantor for life was not a transfer intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of Sec. 302(c) of the Revenue Act of 1926 or corresponding prior statutory provisions.

The text of the proceedings on the floor of the House [set forth in full at p. 61 of the Appendix herein] demonstrates that the amendment was not a clarifying amendment but operated to change the existing law; and that the amendment was intended to operate prospectively and not retroactively.

From the statements made and the discussion on the floor of the House at the time of the passage of the Resolution, we quote:

“Mr. Hawley. * * * the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his heirs—the Supreme Court held that it goes to his heirs free of any estate tax.

“This resolution is to provide that hereafter such shall not be the law.” * * *

“It provides that hereafter no such method shall be used to evade the tax” * * *

“Mr. Garner. * * * The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it.”

Congressional Record—House, pp. 7198, 7199,
March 3, 1931.

The Commissioner of Internal Revenue, on May 22, 1931, in a Treasury decision signed by himself and by the Secretary of the Treasury, ruled on this point as follows:

"In view of the decisions of the Supreme Court of the United States in *Nichols v. Coolidge* (274 U. S. 531, (T. D. 4072, C. B. VI-2, 351)), *May v. Heiner* (281 U. S. 238, (Ct. D. 186, C. B. IX-1, 382)), *Coolidge v. Long* (282 U. S. 582), *Burnet v. Northern Trust Co.* (51 S. Ct. 342), *Edgar M. Morsman, Jr. v. Burnet* (51 S. Ct. 343), and *Cyrus H. McCormick v. Burnet* (51 S. Ct. 343) the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10:30 p. m. Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

T. D. 4314, C. B. X-1; 450-451.

This Treasury Decision has never been modified or rescinded.

In *Hassett v. Welch*, 303 U. S. 303, 82 L. Ed. 858, and *Helvering v. Bullard*, 303 U. S. 297, 82 L. Ed. 582, the Supreme Court held that these amendments were prospective and not retroactive in their application and did not apply to transfers in trust completed prior to March 3, 1931. See also *Bingham v. United States*, 296 U. S. 211, 80 L. Ed. 160.

Although decedent died on August 8, 1934, the Revenue Act of 1934, effective May 11, 1934, made no change in Section 302(c) of the 1926 Act. Therefore, at the time of decedent's death, the statutory provisions of Section 302(c) of the Revenue Act of 1926 were still in effect, so far as transfers in trust completed prior to March 3, 1931 were concerned. The transfer herein involved was completed on August 15, 1923 [Tr. pp. 19, 39, 46, 51].

Appellant apparently is not here contending for a retroactive application of the two amendments (App. Br. p. 10) although the statements in its brief on this point are not clear.

It would appear therefore that the parties to this controversy are in agreement that the issues in this case are controlled by the interpretation and application of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment of March 3, 1931. But, regardless of whether or not the parties are in agreement on this point, Section 302(c) as it read prior to the amendments is the controlling statute here involved.

However, if appellant's brief be construed to contend that the above mentioned amendments of 1931 and 1932 should be applied retroactively to the present case, such application would be in violation of the 5th Amendment to the Constitution of the United States.

Nichols v. Coolidge, 274 U. S. 531, 71 L. Ed. 1184;

Blodgett v. Holden, 275 U. S. 142, 72 L. Ed. 206;

Untermeyer v. Anderson, 276 U. S. 440, 72 L. Ed. 645;

Coolidge v. Long, 282 U. S. 582, 75 L. Ed. 562.

II.

The Controlling Principle of Law Announced and Followed in a Long Line of Supreme Court Decisions Is That No Part of the Value of Property Transferred in Trust Prior to March 3, 1931, Not in Contemplation of Death, Is Includable in Gross Estate Under Section 302(c) of the Revenue Act of 1926 if Such Transfer Was Absolute and Complete When Made, Even Though the Grantor Reserved to Himself the Income From the Property for Life.

In order to demonstrate the accuracy of the foregoing statement we will review, briefly, the decisions dealing with this point.

Gaither v. Miles (1920), 268 Fed. 692:

The underlying principle followed by the Supreme Court in the cases hereinafter referred to, was first announced in 1920 by the District Court of Maryland in *Gaither v. Miles*. That Court held, on the one hand, that one insurance policy and one endowment policy were includable in the gross estate because, in the case of the insurance policy, the decedent had reserved to himself the right to change the beneficiary, and in the case of the endowment policy, which he had assigned, he had reserved, in the assignment, the right to obtain the proceeds upon maturity, if living.

On the other hand, with respect to three other policies of insurance, the Court held that since the decedent had reserved no right or interest thereto in himself and had reserved no right to change the beneficiaries, the value of such policies was not includable in the gross estate. In the one case the decedent had reserved a "string" to

his gift. In the other case he had not. This decision is of interest, not only as the forerunner of the subsequent decisions hereinafter referred to, but also because it is cited with approval in *Helvering v. LeGierse* (1941), 312 U. S. 531, 542, 85 L. Ed. 996, 1000. The rule established in *Gaither v. Miles* has not been altered by any subsequent decision which we have been able to locate; and its recent citation by the Supreme Court in *Helvering v. LeGierse* undoubtedly adds to its weight.

Shukert v. Allen (1927), 273 U. S. 545, 547-548, 71 L. Ed. 764, 766-767:

This case involved a transfer by the decedent on May 5, 1921 in trust with the income to be accumulated for a period of thirty years, whereupon the principal and undistributed income were to be divided among the decedent's children. Shukert died September 29, 1921, a few months after the creation of the trust. There was no contention that the trust was created in contemplation of death. The Government's theory was that since the term of the trust extended far beyond the normal life expectancy of the grantor, the transfer fell literally within the terms of the statute and was intended to take effect in possession or enjoyment at or after death. This was the sole issue in the case. The statute involved was Section 402(c) of the Revenue Act of 1918, which is identical with Section 402(c) of the Revenue Act of 1921, (in effect in 1923 when the instant trust was created) and which is similar to Section 302(c) of the Revenue Act of 1926. The Court said:

"The transfer was immediate and out and out, leaving no interest remaining in the testator. The

trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the circuit court of appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust" (p. 547).

"But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death" (p. 548).

This decision was unanimous.

Nichols v. Coolidge (1927), 274 U. S. 531, 71 L. Ed. 1184:

In 1917 Julia Coolidge transferred two residences in fee to her five children taking back, simultaneously, a lease on the conveyed premises. Because it was the intention of the parties that the grantor should enjoy the use of the premises as long as she lived, the Government sought to include the value of the property in the gross estate of the grantor, when she died in 1921. The Court held that the transfer was absolute; that the right to possess and enjoy the property did not depend upon death; and that the value of property was not includable in the gross estate. The Court also held, on constitutional grounds, that certain other property trans-

ferred in trust by Mrs. Coolidge and her husband in 1907 with the reservation of the income for life to the grantors, the corpus then to be distributed to their five children, was not subject to estate tax.

This decision was unanimous.

Saltonstall v. Saltonstall (1928), 276 U. S. 260, 72 L. Ed. 565:

The question there involved was the imposition of state inheritance taxes. The Court held that if the right to alter the trust remained in the donor until his death, the corpus of the trust was subject to state inheritance tax.

This decision was unanimous.

Chase National Bank v. United States (1929), 278 U. S. 327, 73 L. Ed. 405:

In this case, decided January 2, 1929, certain life insurance policies taken out by decedent on his own life named his wife as beneficiary, but reserved, to the insured, the right to change the beneficiary. The Court held that the reserved right to change the beneficiary left the transfer incomplete until death and made the proceeds of the policies subject to estate tax, as a transfer intended to take effect at death.

This decision was unanimous.

Reinecke v. Northern Trust Co. (1929), 278 U. S. 339, 346, 348-349, 73 L. Ed. 410, 414, 415:

This case, decided January 2, 1929, the same day as *Chase National Bank v. United States*, *supra*, involved two separate sets of trusts; the "two trusts" and the "five trusts". As to the "two trusts", decedent created

the trusts, reserving the income to himself for life and reserving also a power of revocation exercisable by himself alone. The Court held the corpora of the two trusts were subject to estate tax, citing *Chase National Bank, supra*, on the premise that a transfer made subject to a power of revocation in the transferer, terminable at his death, is not complete until his death.

As to the "five trusts", the grantor created life interests in the income in others than himself continuing until specified times after his death. He reserved to himself certain powers with regard to the transferred properties. A power was reserved to alter, change or modify the trusts only with the consent of beneficiaries.

Answering the Government's contention that these powers made the trust taxable in the estate of the decedent, the Court said:

"Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts

were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax" (pp. 346-7).

The Court then continued with language which, in large part, constituted its later opinion in *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, and which, for that reason, is of significance. The Court said:

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

"It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections read together indicate no purpose to tax completed gifts made by the donor

in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53; *United States v. Merriam*, 263 U. S. 179, 187, 68 L. Ed. 240, 29 A. L. R. 1547, 41 Sup. Ct. Rep. 68" (pp. 348-349).

This decision was unanimous.

May v. Heiner (1930), 281 U. S. 238, 242, 243, 74 L. Ed. 826, 827, 828:

The facts are stated in the opinion as follows:

"By a written instrument dated October 1, 1917, Pauline May, wife of Barney May, 'transferred, set over and assigned,' to him and others, as trustees (with power to change the investments), certain described securities—bonds, notes, corporate stocks, and money—in trust, to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance 'to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said trust, in whatever form or shape it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among 'her four children, their distributees, or appointees' " (p. 242).

The Commissioner claimed that the principal of the trust fund could not take effect in possession or enjoyment until at or after death; that according to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death; that the gift of the principal, therefore, could not take effect during decedent's lifetime; and that the case came literally within the terms of the statute.

The Supreme Court, in reversing the courts below, said:

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event" (p. 343).

This decision of the Court was unanimous.

Burnet v. Northern Trust Co. (March 2, 1931),
283 U. S. 782, 75 L. Ed. 1412;

Morsman v. Burnet (March 2, 1931), 283 U. S.
783, 75 L. Ed. 1412;

McCormick v. Burnet (March 2, 1931), 283 U.
S. 784, 75 L. Ed. 1413.

Closely following *May v. Heiner*, *supra*, the Supreme Court decided, on March 2, 1931, three cases: *Burnet v. Northern Trust Co.*, *Morsman v. Burnet*, and *McCormick v. Burnet*, all of which involved transfers in trust with income for life reserved in the grantors. By per curiam

decisions the Court held the transfers were *not* includable in the gross estate as being effective at or after death, citing *May v. Heiner* as controlling.

These decisions were unanimous.

(The day after these decisions were handed down by the Supreme Court, Congress, on the last day of the current session (March 3, 1931), passed a joint resolution amending Section 302(c) of the Revenue Act of 1926 *prospectively* so as to include in the gross estate of a decedent property transferred in trust with a reservation of a life estate (or income for life) to the grantor. In the discussion of the amendment on the floors of the House and Senate, it was definitely stated by the sponsors that the amendment was not retroactive but was prospective only and was not intended to affect any trust theretofore created. Congressional Record, March 3, 1931, pp. 7198, 7199. [Appendix p. 61. See also pp. 7 of this brief.]

Klein v. United States (1931), 283 U. S. 231, 75 L. Ed. 996:

In this case, decided April 13, 1931, the decedent had transferred land to his wife during the term of her life and provided that if she should die prior to the death of the grantor she should take no greater estate and the reversion in fee would remain vested in the grantor, such reversion being thereby reserved; and further providing that should the grantee survive the grantor, in that case only, she should hold the land in fee simple. The Supreme Court held that the grantor had reserved to himself the fee in the land until his death; that the transfer was not complete until his death, and that the property was subject to estate tax.

The *Klein* case is of importance not only because it was pending before the Court when the three decisions of March 2, 1931, referred to above were announced, but also because, later, in *Helvering v. Hallock*, 309 U. S. 106, 84 L. Ed. 604 (the case most strongly relied upon by the appellant in the case at bar) the Supreme Court stated that the *Klein* case furnishes the "harmonizing principle". It should be noted, therefore, that in the *Klein* case, the grantor reserved to himself a "string" by which he held the ultimate disposition of his property in suspense until the moment of his death, while in the three decisions of March 2, 1931 no such control was retained even though the grantors therein did retain the trust income for life.

The decision in the *Klein* case was unanimous.

Porter v. Commissioner (1933), 288 U. S. 436,
77 L. Ed. 880.

In this case, decided March 13, 1933, the trustor created certain trusts, in each of which there was "a paragraph reserving to the donor power at any time to alter or modify the indenture and any or all of the trusts in any manner, but expressly excepting any change in favor of himself or his estate." (p. 439.)

The "string" here was the power to take from the named beneficiaries and substitute others.

The Court said:

"His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, a source of valuable assurance passing from the dead to the living." (p. 444.)

This decision was unanimous.

Helvering v. St. Louis Union Trust Co. (1935),
296 U. S. 39, 45, 46-47; 80 L. Ed. 29, 33, 34.

On November 11, 1935, the Supreme Court decided the case of *Helvering v. St. Louis Union Trust Company*. In this case property was transferred in trust, the income to be paid to the daughter of the grantor, with a provision that at the death of the daughter, if the grantor be living, the trustee was to transfer and deliver the property to the grantor. The majority opinion of the Supreme Court held the remainder was vested subject only to being divested by a condition subsequent which never occurred, and that the provisions in the trust by which the property was contingently to revert to the trustor was not sufficient to subject the property to tax under Section 302(c) of the Revenue Act of 1923.

The majority opinion stated:

“Unlike the Klein case, where the death was the generating source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it.” (pp. 45-6.)

Four justices dissented and in the dissenting opinion stated (p. 47):

“It seems plain that the gift here was not complete until decedent’s death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter. If he had reserved a power to revoke the trust, if he survived her, *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 73 L. ed. 410, 49 S. Ct. 123, 66

A. L. R. 397, *supra*, would have made the gift taxable, as would *Klein v. United States*, 283 U. S. 232, 75 L. ed. 998, 51 S. Ct. 398, *supra*, if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

“Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers’ device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not form.” (Citing cases.) “However we label the device it is but a means by which the gift is rendered incomplete until the donor’s death. The extent to which it is incomplete marks the extent of the ‘interest’ passing at death, which the statute taxes.” (p. 47.)

(The principle thus announced was subsequently followed by the majority of the Court in *Helvering v. Hallock*, 309 U. S. 106 (hereinafter discussed), that where the grantor selects a device—a “string”—by which he retains a right to determine the ultimate disposition of his property until the moment of his death, the gift is incomplete until his death and hence the value thereof is includable in the gross estate under Section 302(c).)

Thus the majority opinion held the transfer in trust to be final and complete when made and hence the value of the property was not includable in the gross estate, while the minority took the view that because of the “string” retained by the grantor the gift was not final and complete, until the moment of death.

Becker v. St. Louis Union Trust Co. (1935), 296 U. S. 48, 50, 89 L. Ed. 35, 37.

In this case, decided on the same day as *Helvering v. St. Louis Union Trust Co.*, the grantor, in 1921, created four trusts, one in favor of each of his four children, reserving to himself a reversion in the event the beneficiaries should predecease him. The majority opinion of the Court held, in conformity with *Helvering v. St. Louis Union Trust Co.*, that the reservation in the trust instrument of a reversion, being based upon a contingency which never happened, did not operate to bring the trust corpus within the grantor's gross estate; while the minority opinion held that the reservation in the trust instrument of a contingent reversionary interest was a "string" which made the gift incomplete until death, and thus operated to bring the value of the corpus within the gross estate.

Helvering v. Bullard (1938), 303 U. S. 297, 82 L. Ed. 852.

In this case, decided February 28, 1938, the decedent had created a trust in 1927 which, in 1932, was declared void in an adversary court proceeding, pursuant to stipulation of the parties. Decedent created a new trust on February 12, 1932, reserving to herself a life interest in the income. The grantor died subsequently and the value of the corpus of the trust was included by the Commissioner of Internal Revenue in the decedent's gross estate. The Court held that the trust property was property from the 1932 trust and since the 1932 trust was created

after the adoption of the Joint Resolution of March 3, 1931, with the reservation of a life interest in the income, the *amendment* operated to bring the value of the corpus within the gross estate.

This decision was unanimous.

Hassett v. Welch (1938), 303 U. S. 303, 82 L. Ed. 858.

Decedent died November 20, 1932. In 1924 he had created a trust, reserving the trust income to himself for life, directing division of the trust income after his death between nephews and nieces, and providing for distribution of the corpus upon the death of the survivor of them amongst their then living issue. The Commissioner included the value of the trust corpus in decedent's gross estate holding that the transfer was intended to take effect in possession and enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926. The Government contended further, that since the decedent died after the adoption of the Joint Resolution of March 3, 1931, the joint resolution and the subsequent embodiment thereof in Section 803(a) of the Revenue Act of 1932, were controlling.

The Court, in an exhaustive analytical opinion, held that the 1931 and 1932 amendments were prospective and not retroactive in their application; that the amendments did not apply to transfers in trust which were final and complete prior to March 31, 1931, the effective date of the Joint Resolution; and that the value of the trust corpus was not includible in the gross estate.

The decision was unanimous.

Helvering v. Hallock (1940), 309 U. S. 106, 110,
84 L. Ed. 604, 608.

Three cases were considered together in this opinion promulgated on January 29, 1940,—the *Hallock* case, the *Huston* case and the *Bryant* case. Each of these cases involved disposition of property by way of trust created prior to the effective date of the joint amendment of March 3, 1931. The grantor reserved to himself *in the trust instrument* a right of reversion of the trust corpus if he survived the life beneficiary. The Court stated that all three of the cases:

“involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is ‘intended to take effect in possession or enjoyment at or after his death’ *by reason of that which he retained*, is the crux of the problem.” (p. 110.) (*Italics added.*)

The Court thus recognized the problem as involving a state of facts where the grantor had retained *in the trust instrument* a contingent right of reversion terminable at his death, or, in other words, a case where the grantor retained a “string” to his gift.

The Court was confronted, however, by its prior decisions in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48 (both decided November 11, 1935), wherein a divided Court had drawn a distinction between those cases where the reversionary interest reserved in the trust instrument would come into effect only upon the happening of a condition subsequent and those cases where the re-

versionary interest reserved in the instrument was vested in the grantor, subject to be defeated only upon the happening of a future event. The majority opinion in those two prior cases had held that if the "string" was tied to a condition subsequent the effect was different from that where the "string" was tied to a condition precedent.

The Court in discussing the two *St. Louis Union Trust Co.* cases, and the *Klein* case, said:

"In none of the three cases did the dominion over property which finally came to the beneficiary fall by virtue of the grantor's will, except by his provision that his own death should establish such final and complete dominion." (p. 114.)

The Court, further referring to the *Klein* case, said:

"By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor." (p. 112.)

The Court then stated:

"Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of Sec. 302(c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Union Trust Co.* cases, the *Klein* case furnishes such a harmonizing principle." (p. 118.)

The Court, in concluding its opinion, stated:

"The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further ex-

amination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the St. Louis Union Trust Co. cases in applying the Klein doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere." (p. 122.)

The Court thus made it clear that it was following the precedent set by the long line of cases leading up to and followed in the *Klein* case, but that it was unwilling to follow the technical "diversities" of the two St. Louis Union Trust Co. cases. Hence it overruled those two cases, leaving in effect the rule established by the prior cases.

The Court did not overrule *Hassett v. Welch* either by implication or otherwise, inasmuch as that case merely followed the same rule set forth in the Court's prior unanimous decisions in the *Klein* case and in *May v. Heiner*, *Burnett v. Northern Trust Co.*, *Morsman v. Burnet* and *McCormick v. Burnet*, namely, that where the grantor retains in the instrument of transfer a "string" to his gift, whereby he may control the ultimate disposition of his property until the moment of his death, the transfer is not complete and hence is intended to take effect in possession or enjoyment at or after his death, but, conversely, where the transfer is absolute when made, without the reservation of any "string," the gift is complete when made and is not intended to take effect in possession or enjoyment at or after death.

* * * * *

It will be observed that the foregoing cases may be classified into two distinct groups; the first, those wherein trust provisions having to do with disposition of corpus are considered, and, the second, those wherein the case turns on a trust provision dealing with the distribution of income.

In the first group are found those cases wherein particular "strings" render the transfers incomplete and serve to bring the case within the statute, for example, the reserved right to change the beneficiary and to receive proceeds of an endowment policy (*Gaither v. Miles, supra*); the reserved right to revoke a trust and recover the corpus (*Reinecke v. Northern Trust Co., supra*); a retention of a reversionary interest to pass only on the death of the grantor prior to that of the life beneficiary (*Klein v. United States, supra*), and the reservation of a possibility of reverter in the event the life beneficiary predeceased the grantor (*Helvering v. Hallock, supra*).

In the second group various trust provisions affecting distribution of income were under consideration, such as one for accumulation of income for period extending beyond the life expectancy of the grantor (*Shukert v. Allen, supra*); a simultaneous leasing back of premises to the donor (*Nicholas v. Coolidge, supra*); the reserved right to receive trust income after death of prior life income beneficiary (*May v. Heiner, supra*); a reservation of income of the trust for the life of the grantor (*Burnet v. Northern Trust Co., supra*; *Morsman v. Burnet, supra*, and *McCormick v. Burnet, supra*). In each case in the latter group, the Supreme Court held that the provision respecting distribution of income did not constitute a "string" bringing the transfer within the statute since

the transfer of the interest in the property sought to be included in the gross estate was absolute and complete when made.

In passing upon the taxability of gifts, the Supreme Court of the United States on November 6, 1939, held as follows:

“There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it become subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet v. Guggenheim*, *supra* (288 U. S. 286, 77 L. Ed. 751, 53 S. Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.”

Sanford's Estate v. Commissioner, 308 U. S. 39, 44, 84 L. Ed. 20-23.

Rehearing denied December 4, 1939; 308 U. S. 367. This decision was unanimous.

On December 6, 1939, the Supreme Court also decided the case of *Rasquin v. Humphreys*, 308 U. S. 54, 84 L. Ed. 77, in which they reiterated the principles of the *Sanford* case.

This decision was unanimous.

These cases definitely adopted as a fixed rule for determining taxability of a gift the same principle as for determining taxability for estate tax. That is, if the grantor retains a string on the property by which he retains control, it is not a gift and it is subject to tax in the estate. If the transfer is complete and the donor does not retain control over the property in himself, then it is a gift and is not subject to estate tax.

The opinion thus set forth in *Helvering v. Hutchins*, *supra*, was reiterated by the Supreme Court on March 3, 1942, after the *Hallock* case, in which the same underlying principle was followed and in which the Court cited the *Sanford* case and the *Rasquin* case.

Helvering v. Hutchins, 312 U. S. 393, 85 L. Ed. 909.

This decision was unanimous.

The controlling principle of law followed in the foregoing cases is that no part of the value of property transferred in trust prior to March 3, 1931, not in contemplation of death, is includable in the grantor's gross estate under Section 302(c) of the Revenue Act of 1926, or similar prior statutory provisions, even though the grantor reserved to himself the income from the property for life, and regardless of whether he died before, on, or after March 3, 1931.

III.

The Transfer of the Interest Here Involved Was Complete and Irrevocable in 1923 When Made.

The trust in controversy was created August 15, 1923. By the terms of the trust instrument the trust property was transferred to the trustees without the retention by the trustor of any interest whatsoever in the corpus, without the retention of any power to alter or amend the trust in any manner whatsoever, without the retention of any right to change any beneficiary or the interest of any beneficiary, and without the retention of any right of reversion, contingent or otherwise. [Tr. pp. 19-27.] The trial court found the trust to be irrevocable. [Tr. pp. 46, 47, 51.]

Section 2280 of the Civil Code of California, in effect at the time of the creation of the trust, provided:

“Sec. 2280. NOT REVOCABLE. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.”

Section 2280 of the Civil Code of California was amended in 1931, but the amendment specifically provided that “any trust created prior to the date when this act shall become a law shall not be affected thereby.” Statutes 1931, p. 1955.

The trust instrument herein involved contained no provision for revocation, alteration, modification or cancellation [Tr. pp. 19-27, 47], and continued in full force until

its termination, by its terms, on the death of the wife Marian M. Brown on February 8, 1940 [Tr. p. 46], five years and six months after the death of the testator herein.

Appellant admits that the trust was irrevocable (Br. p. 3); and the trial court found:

“That no right of alteration or amendment, or other right of revocation or control was retained by Frederick L. Brown, deceased, or his said wife, Marian M. Brown, deceased, either alone or with any other person.” [Tr. p. 47.]

The transfer of the interest in property herein sought to be included in decedent's gross estate was absolute and complete in 1923, when made. Decedent retained no “string” whereby he could control thereafter, in any manner whatsoever, the disposition thereof.

Under the rule stated by the Supreme Court and set forth in part II of this brief, the transfer in the present case was not a transfer intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment thereof by the Joint Resolution of March 3, 1931.

The mere retention by the grantor of a portion of the trust income for life, is of no significance. It does not bring the transfer within Section 302(c) as it read prior to the amendment.

Therefore, no portion of the value of the remainder interest is includable in the decedent's estate.

Appellant's contention that the grantor's reservation of a portion of the trust income to himself for life oper-

ates to bring the transfer within the meaning of Section 302(c) of the Revenue Act of 1926 as it stood prior to the amendment by the Joint Resolution of March 3, 1931 (Br. pp. 6, 10), is contrary to *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826; *Burnet v. Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412; *McCormick v. Burnet*, 283 U. S. 784, 75 L. Ed. 1413, and *Hassett v. Welch*, 303 U. S. 303, 82 L. Ed. 858, and to the converse of the rule as stated in *Klein v. United States*, 283 U. S. 231, 75 L. Ed. 996, and *Helvering v. Hallock*, 309 U. S. 106, 84 L. Ed. 604. The contention is also at variance with the legislative history of the amendment.

Furthermore, it may be noted that the income received by the grantor from the trust during his lifetime, or assets acquired therewith, constituted part of his gross estate, and to the extent of the value thereof at the time of his death were included in the return of estate tax.

The interest here in controversy is the *remainder* interest and that interest was finally and completely disposed of by the decedent in 1923 *inter vivos*. There was no retention of any "string" to that transfer.

Two recent decisions of the Board of Tax Appeals, *i. e.*, *Estate of Edward Lathrop Ballard, Deceased, et al. v. Commissioner of Internal Revenue* promulgated October 1, 1942, and *Mabel Shaw Birkbeck Estate, et al. v. Commissioner*, promulgated October 6, 1942, sustain the contentions of appellee that Section 302(c) of the Revenue

Act of 1926, as amended is not retroactive and does not apply to the instant case, and that under said Section 302(c) of the Revenue Act of 1926, as it read prior to the amendment thereof in 1931, no part of the property of the trust here involved is properly included in decedent's gross estate for Estate Tax purposes.

Estate of Edward Lathrop Ballard, Dec'd. et al.
v. Commissioner, 47 B. T. A. Adv. Op. #107:

Mabel Shaw Birkbeck Estate, et al. v. Commissioner, 47 B. T. A. Adv. Op. #109.

IV.

The Appellant's Conclusions Are Not Based Upon Facts and Are Not Supported by the Authorities Cited.

AS TO APPELLANT'S (a):

1. The first point urged by appellant is that the ultimate disposition of the trust corpus was suspended during the lifetime of the decedent. In support thereof appellant relies upon the wording of the trust indenture which provides:

"The trust hereby created shall terminate upon the death of the survivor * * * and *thereupon the title to said trust property shall vest absolutely in equal shares in*" his children. (Italics added.) [Tr. p. 24.]

Upon the execution of the trust, the title to the trust property passed completely from the trustor and vested in the trustees, as such, to be held by them as trustees for the benefit of the named beneficiaries, upon the conditions imposed upon them by the trust indenture.

The provision above quoted from the trust instrument could mean only, that upon the termination of the trust at the trustor's death or at the later death of his wife, the property would be freed from the control of the trustees, and the legal title held by the trustees would merge with the equitable title of the beneficiaries and become an absolute title in the beneficiaries.

If the appellants' argument were sound, there could never be an absolute and complete transfer of a remainder in trust, because the title thereto could never vest in the remaindermen until the termination of the trust. That such is not the case is evident from the many decisions referred to above.

Furthermore, recent pronouncements of the Supreme Court have established beyond argument the principle that in matters of taxation substance rather than form should govern.

Gregory v. Helvering, 293 U. S. 465, 79 L. Ed. 596;

Helvering v. Clifford, 309 U. S. 331, 84 L. Ed. 788;

Higgins v. Smith, 308 U. S. 473, 84 L. Ed. 406.

The substance of the provision in question is only to the effect that upon termination of the trust, the property shall be delivered to the designated individuals. The Government's attempt to emphasize verbiage to the effect that disposition is suspended because of use of the words "Thereupon * * * title * * * shall vest * * *" finds no support in the judicial approach to questions of this type as manifested by the cases heretofore cited.

However, even conceding for purpose of argument that the ultimate recipient or recipients of the transferred property were unascertainable, such fact is totally immaterial. If the transfer is “immediate and out and out,” it matters not that an interest “might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust.”

Shukert v. Allen (1927), 273 U. S. 545, 547, 71 L. Ed. 764, 766.

None of the cases cited by appellant in part (a) of its brief supports the view that the ultimate disposition of the trust corpus involved in the present case was suspended during the lifetime of the decedent.

2. Appellant argues that “the instant transfer was a substitute for a testamentary disposition in a very real sense since it provided for the distribution of the bulk of the grantor’s property after death,” and hence the statute was designed to reach and include the transfer. (Br. p. 7.)

The transfer in this case was not testamentary in character. The trial court specifically found that the transfer was not made in contemplation of death [Tr. pp. 47-48, 50], and the evidence on this point is without conflict. [Tr. pp. 62-66.]

Appellant’s contention that the provision in the trust instrument, for distribution of the trust corpus after the death of the survivor of the decedent and his wife, makes the transfer testamentary in character and, hence within the statute, is at variance not only with the long line of Supreme Court decisions review in part II of this brief,

but also with the statements made on the floor of the House at the time of passage of the Joint Resolution of March 3, 1931. If appellant's contention were correct the amendment incorporated in the Joint Resolution would have been unnecessary. The amendment merely added the very thing which appellant now contends was already included in the section as it stood prior to the amendment. Appellant's contention clearly is untenable.

3. Appellant contends that its position "is supported by *Helvering v. Hallock*, 309 U. S. 106." (Br. p. 8.)

Helvering v. Hallock does not support appellant's position. In each of the three cases decided by the Court in *Helvering v. Hallock*, and in each of the three prior Supreme Court decisions reviewed therein, the possibility of reverter, which the Court fixed upon as the "string" warranting the inclusion of the value of the interest in the transferred assets under Section 302(c), arose as the result of specific provisions of the trust instrument. In the present case there was no reservation of any possibility of reversion, contingent or otherwise, in the trust instrument. The transfer was as absolute and complete when made as any man could make it. The appellant's claim that the *Hallock* case supports its position is patently unsound.

4. Appellant stated that "In the instant case there was a possibility of reverter, remote though it may have been * * *." (Br. p. 8.)

The facts of this case do not support appellant's statement. The decedent did not reserve to himself, either directly or indirectly, any reversionary interest whatsoever, contingent or otherwise. The trust instrument contains no

such provision. [Tr. pp. 19-27.] The only possibility that the grantor could ever become repossessed of the trust corpus, or any part thereof, would be by reason of failure of the trust due to the death of all beneficiaries,—three children, wives of two children, seven grandchildren, the possibility of additional grandchildren, and the possibility of other descendants of grandchildren—prior to that of the grantor. In such case only, the trust corpus would be returned to him by operation of law. Aside from the remoteness of such an infinitesimal possibility (there are no actuarial tables from which such a possibility can be determined), such a possibility of thus becoming repossessed of the trust property does not constitute the retention by the grantor of a reversionary interest.

If the government's interpretation of the statute viz., that the infinitesimal chance that the grantor might survive all beneficiaries and thereupon recover the corpus of the trust by reason of its failure for lack of beneficiaries, brings the statute into operation, then, every transfer in trust no matter how completely made would be included under Section 302(c).

5. Appellant's statement that the *Hallock* case has not been restricted to its precise facts (Br. p. 9) is true, but when the rationale of that case is understood it is apparent that in all of the cases cited by the appellant to demonstrate its statement there has been no deviation from the principle adhered to in the *Hallock* case, and the preceding cases upon which it is based.

An examination of the cases cited fails to disclose anything which supports appellant's contention in the present controversy. We will analyze these cases:

Commissioner v. Clise, 122 Fed. (2d) 998 (C. C. A. 9th).

Nothing in that case lends any support to appellant's argument, and nothing in that case is in any way out of line with the decisions of the United States Supreme Court heretofore cited.

Commissioner v. Wilder's Estate, 118 Fed. (2d) 281 (C. C. A. 5th).

That case involved the purchase of an annuity contract out of community funds, the income during the life of the husband to be paid to him and after his death the income to be paid to his wife. The Court held that the wife owned one-half of the contract and that on the death of the husband the value of his one-half was transferred to her. This case did not involve a transfer prior to death, but was a transfer which took effect only upon death.

Chase National Bank v. United States, 116 Fed. (2d) 625 (C. C. A. 2d).

This case involved a paid up insurance policy and provided for the payment of the face of the policy to the insured's wife "if the beneficiary survived the insured, otherwise to the executors, administrators or assigns of the insured." In this case, as in the cases we have cited from the Supreme Court, the title remained in the insured until his death.

In this case, had the husband survived the wife, one-half of the face of the policy would have been taxable in her estate.

Commissioner v. Washer, 127 Fed. (2d) 446 (C. A. 6th).

This case involved insurance policies in which the wife was named beneficiary, but the testator reserved the right to change the other beneficiaries if the wife should predecease him. This, as well as the two preceeding cases involved insurance policies. They are not directly in point, but none of the decisions conflict in any way with the rules laid down by the Supreme Court heretofore cited.

Chase National Bank of New York v. Higgins, 38 Fed. Supp. 858 (S. D. N. Y.).

In this case the trustor, in 1927, gave property in trust, reserving the income for life, but also reserving the right to all or part of the corpus and in fact did invade the corpus during her life. The Court held that the 1931 amendment to Section 302(c) did not apply as it was not retroactive. The Court held the corpus taxable in the estate of the trustor because she retained a "string" in that only what remained of the corpus at her death was to pass to the beneficiary.

Nothing in this case conflicts with the rule laid down by the Supreme Court.

Van Vranken v. Helvering, 115 Fed. (2d) 709 (C. C. A. 2d).

This is an income tax case involving the determination of what constituted the basis for determining profits, and the Court held on the facts that the property was transferred to the beneficiary at the time of the decease of the testator and that the basis for determining future profits was the value at the time the testator died, as against a

claim that the basis was the value on the date of distribution. The case is in no way in point in any issue in controversy herein.

Helvering v. Le Gierse, 312 U. S. 531, 85 L. Ed. 996.

This case involved certain insurance and annuity contracts. The Court said: "The 'insurance' policy contained the usual provision for surrender, assignment, optional modes of settlement, etc." Thus the control of the property was retained by the testatrix until her death. The policies were taken out in 1936. After deciding that the policies were not "insurance" the Court held the proceeds taxable in the following language:

"The only remaining question is whether they are taxable.

We hold that they are taxable under Sec. 302(c) of the Revenue Act of (February 26) 1926, as amended, as a transfer to take effect in possession or enjoyment at or after death. See *Helvering v. Tyler* (CCA 8th) 111 F. (2d) 422, 311 US 629, *ante*, 400, 61 S. Ct. 49; and *Old Colony Trust Co. v. Commissioner of Internal Revenue* (CCA 1st) 102 F. (2d) 380, *supra*; *Kernochan v. United States*, 89 Ct. Cl. 507, 29 F. Supp. 860; *Guaranty Trust Co. v. Commissioner of Internal Revenue*, 16 BTA(F) 314, *supra*; compare *Gaither v. Miles* (DC) 268 F. 692; Comment, 38 Mich. L. Rev. 526; Comment, 32 Ill. L. Rev. 223."

Helvering v. Le Gierse, 312 U. S. 531, 542, 85 L. Ed. 996, 1000;

Commissioner v. Kellogg, 119 Fed. (2d) 54 (C. C. A. 3d).

Appellant contends that this decision was incorrectly decided.

This case is further cited at page 45, *infra*.

Nothing in the cases cited by the appellant and discussed above conflicts with the rule in the *Kellogg* case, which case followed *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, and *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 73 L. Ed. 410, both of which cases have heretofore been listed among the unanimous decisions of the United States Supreme Court which established the rule adopted in the *Hallock* case.

On October 1, 1942, the Board of Tax Appeals promulgated a decision citing the *Kellogg* case with approval in the following language:

“The Circuit Court of Appeals for the Third Circuit, in *Commissioner v. Kellogg*, 119 Fed. (2d) 54, refused to extend the doctrine of *Helvering v. Hallock*, *supra*, to a case where the trust property transferred by the decedent might revert to the decedent not by virtue of the terms of the trust instrument but because of failure of the trust. The *Kellogg* case imposes a logical limitation on the scope of Section 302(c). We think that here, too, the application of the *Hallock* doctrine would cause an unwarranted extension of that section.”

Estate of Edward Lathrop Ballard v. Commissioner, 47 B. T. A. Ad. Op. #107.

AS TO APPELLANT'S (b):

Appellant's point (b) is that, because of the reservation of income for life, the transfer was intended to take effect at death to the extent that the decedent reserved an interest in the Trust Income. (Br. p. 9.)

1. Appellant states that it is not relying upon the retroactive application of the amendments made by the Joint Resolution of March 3, 1931, and by Section 803(a) of the Revenue Act of 1932; but is relying upon the wording of Section 302(c) of the Revenue Act of 1926, as it read prior to the amendments. (Br. p. 10.)

The same contention was considered and rejected by the Supreme Court in *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826; *Burnet v. Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412, and *McCormick v. Burnet*, 283 U. S. 784, 75 L. Ed. 1413.

And, in *Hassett v. Welch*, 303 U. S. 303, 82 L. Ed. 858, the Court necessarily approved of its prior decisions in those four cases because, otherwise it could not have held that the transfers were not within the statute as it stood prior to the amendments.

Appellant's contention, however, is based primarily upon the proposition that *May v. Heiner*, *Burnet v. Northern Trust Co.*, *Morsman v. Burnet* and *McCormick v. Burnet* were overruled by *Helvering v. Hallock*. (Br. p. 11.)

Helvering v. Hallock did not overrule *May v. Heiner* or the other three cases above referred to, either directly or by implication. As pointed out hereinabove these cases are not in conflict with *Helvering v. Hallock*.

The problem in the *Hallock* case, as stated by the Court was the reconciliation of its prior decision in the *Klein* case with the two *St. Louis Union Trust Co.* cases. The Court said:

“Neither here nor below does the issue turn on the unglossed text of Sec. 302(c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, *Klein v. United States*, 283 U. S. 231, 75 L. ed. 996, 51 S. Ct. 398; *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 80 L. ed. 29, 56 S. Ct. 74, 100 A. L. R. 1239, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 80 L. ed. 35, 56 S. Ct. 78. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. 308 U. S. 532, 538, 543, ante, 448, 453, 458, 60 S. Ct. 82, 94, 141. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is ‘intended to take effect in possession or enjoyment at or after his death’ by reason of that which he retained, is the crux of the problem” (p. 110).

“Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of Section 302(c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Union Trust Co. Cases*, the *Klein Case* furnishes such a harmonizing principle” (p. 118).

"We therefore reject as untenable the diversities taken in the St. Louis Union Trust Co. Cases in applying the Klein doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere" (p. 122).

Helvering v. Hallock, 309 U. S. 106, 110, 118, 122, 84 L. Ed. 604, 607-8, 612, 614.

Furthermore, subsequent to *Helvering v. Hallock*, which was decided January 29, 1940, the courts have recognized the continuing effectiveness of *May v. Heiner*, *supra*, and *Hassett v. Welch*, *supra*, and have found no conflict in principle between those two cases and *Helvering v. Hallock*, *supra*. Appellant has cited no Court decisions to support his theory.

In *Blakeslee v. Smith*, 110 Fed. (2d) 364, decided March 18, 1940, the Circuit Court of Appeals for the Second Circuit stated:

"We do not understand that the government is any longer contending that by this trust the settlor made a transfer of any property intended to take effect in possession or enjoyment at or after his death. Nor could it maintain that position under the law as declared in *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; which was followed by *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; and *McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413. Equally futile now would be any attempt to have the provisions of the statute as amended first by the Joint Resolution of March 3, 1931 and then by the Act of June 6, 1932,

26 U. S. C. A. Int. Rev. Code, 811, made applicable to any transfers previously made. That amendment is not retroactive. *Hassett v. Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858" (p. 366).

Again, in *Commissioner v. Flanders*, 111 Fed. (2d) 117, decided April 15, 1940, the same Circuit Court of Appeals said:

"We agree also with the Board's conclusion that Trust No. 3 is not taxable under section 302(c) as a transfer to the remaindermen intended to take effect in possession or enjoyment at or after death. Since the trust was created prior to March 3, 1931, it is conceded that the corpus would not be includible in the settlor's gross estate merely because of the reservation of the life use of the income. *Hassett v. Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858" (p. 120).

* * * * *

"A different situation is presented by Trust No. 4. There the settlor reserved a remainder contingent upon his surviving his two younger brothers whose lives measured the duration of the trust. In view of the decision of the Supreme Court in *Helvering v. Hallock*, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368, handed down January 29, 1940, we hold the settlor's possibility of reverter a taxable interest under Section 302(c)" (p. 121).

Commissioner v. Kellogg, 119 Fed. (2d) 54, decided March 20, 1941, a decision by the Circuit Court of Appeals for the Third Circuit, contains the following language:

"The petitioner further contends that even if he is in error in urging that the corpus of the trust

is includible in the grantor's estate under the principles of *Helvering v. Hallock*, none the less the transfer was a substitute for the testamentary disposition of the grantor and, in the words of the statute, was 'intended to take effect in possession or enjoyment at or after his death'. In short the petitioner relies on the exact language of the statute. His difficulty in sustaining this contention arises also with *May v. Heiner* and becomes insurmountable, so far as this court is concerned, when we contemplate the decision in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347-348, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397. If the words of the statute just quoted are to receive the meaning contended for by the petitioner, they must receive it from the Supreme Court" (pp. 57-58).

The Circuit Court of Appeals for the Ninth Circuit, in *Commissioner v. Clisc*, 122 Fed. (2d) 998, decided October 4, 1941, after referring to the decisions of the Supreme Court in *May v. Heiner*, *supra*, *Burnet v. Northern Trust Co.*, *supra*, *Morsman v. Burnet*, *supra*, and *McCormick v. Burnet*, *supra*, decided on April 14, 1930; to the three cases, decided March 2, 1931, by the Supreme Court on the authority of *May v. Heiner*, *supra*; to the adoption of the Joint Resolution on March 3, 1931, and after having quoted from *Hassett v. Welch*, *supra*, decided by the Supreme Court in 1938 this Court gave consideration to *Chemical Bank & Trust Co.*, 37 B. T. A. 535, as the only decided case based on identical facts. After reciting briefly the facts in the *Chemical Bank* case to the effect that the decedent had purchased prior to March 3, 1931, two irrevocable annuity contracts, payable to himself so long as he should live, this Court

referred to and gave recognition to the effectiveness of *Hassett v. Welch* in the following language:

“Although *Hassett v. Welch*, *supra*, had been decided approximately a month when the Board of Tax Appeals promulgated the above decision, and the writer of the Board’s opinion was aware of it (cf. 37 B. T. A. 542), the Board did not treat the question of retroactive operation of the amendment to the Act in its discussion of this phase of the problem before it in the Chemical Trust case, *supra*.

“We cannot approve the Board’s reasoning in the Chemical Bank & Trust Case; the Board’s view of the situation confronting it there does not coincide with ours. *Moreover, that case could have been decided upon the authority of Hassett v. Welch, supra.*” (Italics ours) (p. 1003).

In *Central National Bank of Cleveland v. United States*, 41 Fed. Supp. 239, decided October 6, 1941, the Court of Claims made it plain that it did not deem *Helvering v. Hallock*, *supra*, to have overruled *May v. Heiner*, *supra*. The Court said:

“In *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, the trust created a life estate in the settlor’s husband and, after his death, if he predeceased her, a life estate in herself, with remainder in her children. The entire fee was disposed of by the instrument; the beneficiaries acquired no additional right by the settlor’s death. At the grantor’s death the beneficiaries came into the possession of the thing, title to which had already been given them. Hence, it was held there had been no transfer at death subject to the tax” (pp. 245-246).

It is particularly worth of note that the Court of Claims stated that under the authority of the *Hallock* case "We hold that an interest in the property transferred took effect in possession or enjoyment on the grantor's death" and stated further that it must follow from that and other cases referred to in the decision that "*the interest in the property which had already vested in the beneficiaries and which was not transmitted by death is to be excluded from the gross estate*" (p. 248). (Italics ours.)

These cases clearly establish the fact that all United States Circuit Courts of Appeals, which have had occasion to consider the question, and the United States Court of Claims have been unanimous in the conclusion that there is no conflict in principle between the cases of *May v. Heiner*, *Hassett v. Welch*, and *Helvering v. Hallock*. The same conclusion was reached by the District Court of New York in *Chase National Bank v. Higgins*, 38 Fed. Supp. 858, decided May 15, 1941, and the District Court of New Jersey in *Blunt v. Kelly*, 41 Fed. Supp. 721, decided November 8, 1941, as well as the court below in its decision in the present case.

Appellant cites the dissenting opinion of Mr. Justice Roberts in the *Hallock* case and the decision of the United States Board of Tax Appeals in the *Mary H. Hughes* case, 44 B. T. A. 1196 in support of its contention that *Helvering v. Hallock* overruled *May v. Heiner*. (Br. p. 11.) Obviously the majority in the *Hallock* case did

not share Mr. Justice Roberts' views as to the effect of the *Hallock* decision in this respect. The Court said:

"But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, *when such adherence involves collision with a prior doctrine* more embracing in its scope, intrinsically sounder, and verified by experience." (Italics added.)

Helvering v. Hallock, 309 U. S. 105, 119, 84 L. Ed. 604, 612.

The prior doctrine referred to was the doctrine of the *Klein* case, 283 U. S. 231, 75 L. Ed. 996. The Court specifically so stated (pp. 118, 122). That the *Klein* case is in complete harmony with *Burnet v. Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412; and *McCormick v. Burnet*, 283 U. S. 784, 75 L. Ed. 1413, is quite evident when we consider the fact that all four of these cases were pending before the Court at the same time. The *Klein* case was argued February 27, 1931; the *Northern Trust Co.*, *Morsman* and *McCormick* cases were decided March 2, 1931; and the *Klein* case was decided April 13, 1931. All of those decisions were unanimous. The three cases decided March 2, 1931, were decided specifically and solely upon the authority of *May v. Heiner*. The conclusion is inescapable that the Supreme Court itself considered *May v. Heiner* to be in harmony with the *Klein* case; and that *Helvering v. Hallock* was merely a re-application of the rule of the *Klein* case.

As to the *Hughes* case, *supra*, that decision could have been reached without the statement by the Board as to the effect of the *Hallock* case on *May v. Heiner*.

The facts were that Mary Hughes entered into a contract whereby the insurance company agreed to pay, during the life of her son Frank C. Hughes, a fixed sum monthly.

During Mrs. Hughes life this sum was to be paid to her. After her death it was to be paid to four children in equal parts with provisions for successor beneficiaries in case of death of any beneficiaries. The principal paid in belonged to the insurance company.

The contract provided that on the death of Frank C. Hughes at least \$900,000.00 was to be paid to the named beneficiaries.

This was not a transfer in trust or otherwise. It was clearly a contract owned by Mrs. Hughes, whereby the insurance company agreed to pay to others at or after her death a sum of money of at least \$900,000.00.

The contract further provided that should she survive the named beneficiaries the balance should be paid to her estate. She at all times owned the contract.

Moreover the *Hughes* case on appeal by the taxpayer to the Circuit Court of Appeals for the Seventh Circuit was dismissed by stipulation of the parties on agreed motion April 8, 1942, C. C. H., FINH. C. 1. 3435, the government choosing to accept an amount much less than the asserted liability by way of compromise, rather than to submit the case to the Court on review. Inasmuch as that case was never affirmed by the Circuit Court of Appeals, it cannot be considered as authoritative. The Board

has not cited the case in any decision since the appeal was dismissed.

The appellant has cited two cases in which the *Hughes* case was cited by the United States Board of Tax Appeals prior to its dismissal on appeal, but in neither case did the decision rest upon it.

The case of *Corca C. Feynolds*, 45 B. T. A. 44, Adv. Op. #9 (C. C. H. #12064), decided September 5, 1941. The result arrived at by the Board in this case, *i. e.*, holding that the proceeds from this contracts were subject to tax is correct and is justified by the decisions of the Supreme Court. We do not agree with the reasoning of the Board as to the indivisibility of the contracts, but this question is not at issue here.

The facts in the *Reynolds* case were that three insurance policies were taken out by the decedent. The insurance policies were assigned to a trustee. They were assigned to the trustee purely and solely for the purpose of collection, after the death of the insured, and to make distribution of the proceeds, thereafter. The trustee was not given the power to surrender the policies or to borrow on the policies. Therefore, the death of the insured was the motivating act which completed the transfer of the policies from the donor to the trustee or the beneficiary.

This was a clear case in which the insured, by executing an irrevocable trust, definitely prevented the trustee or any one else from receiving the economic benefits of the policies during her life.

Had it been desirable to borrow on these policies it would have been necessary for the donor to have made an

additional transfer of that power. The donor did not make a completed gift of the contracts, but made a transfer of the title to the trustee conditioned on the trustee and beneficiary receiving the benefit of the policies only after the death of the insured.

In the *Estate of Frederick S. Fish*, 45 B. T. A. 120, Adv. Op. #21, (appeal C. C. A.—2 dismissed April 6, 1942, C. C. H. FINH, C. I. 3435) reciprocal trusts created prior to March 3, 1931, were under consideration. The Board applied the theory of *Lehman v. Commissioner*, 109 Fed. (2d) 99, and regarded the decedent as creator of the trust of which his wife was nominal grantor and in which he was life income beneficiary and had a power of appointment over the remainder. So viewed, the Board, relying on the *Hughes* case, *supra*, held the transfer includible and then added:

“Even without regard to his retention of the income, decedent, again in the view that he was in effect the grantor, retained a power of appointment over the remainder which, whether exercised or not, subjects his estate to taxation under the provisions of section 302(c) and (d). *Commissioner v. Chase National Bank of New York* (C. C. A., 2d Cir.), 82 Fed. (2d) 157; certiorari denied, 299 U. S. 552; *Porter v. Commissioner*, 288 U. S. 436.”

See:

Estate of Ballard, 47 B. T. A. Adv. Op. #107,
October 1, 1942;

Birkbeck Estate, 47 B. T. A. Adv. Op. #109,
October 6, 1942.

It is clear, therefore, that reliance on the *Hughes* cases was totally unnecessary in reaching the answer in the case.

AS TO APPELLANT'S (c):

The third point urged by appellant is that, viewing the interests retained by the decedent as a whole, the transfer of the remainder interests took effect at decedent's death. Appellant relies upon *Helvering v. Clifford*, 309 U. S. 331, in support of its contention. (Br. p. 11.)

(It may be observed, parenthetically, that the retained life interests in the present case did not terminate upon decedent's death in 1934 but continued until Mrs. Brown's death in 1940.)

(1) The specific language used by appellant in urging this point is:

"Experience with the doctrine of *Helvering v. Clifford*, 309 U. S. 331, demonstrates that the combination of several factors may result in tax consequences beyond those reached where one or more of the factors appears in isolation. That approach seems equally appropriate here. It is not necessary to consider the provisions of the trust indenture piecemeal." (Br. p. 11.)

We fail to understand appellant's language. He does not state what "experience" he refers to, nor does he cite any cases from which we can draw conclusions. If it is intended by this statement that the Court is to disregard the facts in the case and to read into the case the facts in the *Clifford* case and subsequent cases in which it is cited, we still fail to find anything in that case contrary to the contentions made herein. The case of *Helvering v. Clifford*, 309 U. S. 331, 84 L. ed. 788, was an income tax case construing Section 22a of the Revenue Act of 1934, in which a short term trust for a period of five years was

created, the trust instrument reserving to the grantor all of the powers over the property which he would have had if no trust had been created, and providing that the trust corpus upon the termination of the trust was to revert to the trustor. The Court said:

“The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position.”

Helvering v. Clifford, 309 U. S. 331-335, 84 L. Ed. 788, 791-2.

The case was decided February 26, 1940.

It will thus be observed that the rule followed in the *Clifford* case is the same rule as was followed in the long series of decisions of estate tax cases; that is, where the grantor retains in the trust instrument a reversionary interest in the corpus he remains the owner of the trust property.

In the present case the grantor reserved no power whatsoever over the trust corpus; the trust was not a short

term trust, and no reversionary interest was reserved in the trust instrument.

(2) Appellant makes a statement on page 12 of its brief that “no child could have any assurance that a share of the corpus would vest in him until the death of the decedent and his wife.” Surely the appellant does not mean to contend that the rules of property have been so completely altered by the case of *Helvering v. Clifford* as to establish that a definite vested interest irrevocably created does not constitute a vesting in the beneficiaries, within the meaning of Section 302(c) of the Revenue Act of 1926.

A case similar to the one in controversy was decided by the Supreme Court February 24, 1931, three days before the *Klein* case was argued. In this case a grantor and his wife each transferred property in trust. The Supreme Court said:

“By the deed of each grantor, one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in *praesenti* to be possessed and enjoyed by the sons upon the death of such survivor. (Citing cases.) The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of control over the principal; they had no power to revoke or modify the trust. *Coolidge v. Loring* (235 Mass. 223, 126 N. E. 276.) Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a

generating source of any right in the remaindermen. *Knowlton v. Moore*, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 S. Ct. 747. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. * * * The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it."

Coolidge v. Long, 282 U. S. 582, 597, 598, 75 L. Ed. 562, 567.

The thing which is subject to Federal estate tax is that which passes from the decedent or from his control at his death. In the case at bar, nothing passed by virtue of the death of the testator of the trust herein to any of the beneficiaries. Nothing whatever passed on the death of the grantor. The fact that any one of the children might be divested of his interest in the trust by his own death and his interest might thus be transferred to other beneficiaries of the trust, does not cause anything to pass on the death of the grantor of the trust. If one of these beneficiaries had died, his interest in that trust which passed on his death, might be subject to tax in his estate

but it is not subject to tax in the estate of Frederick L. Brown the trustor.

The contention of the appellant that the transfer of the remainder interests took effect at decedent's death is wholly without foundation.

Conclusion.

The trust here involved was irrevocable. The grantor did not reserve to himself any interest whatsoever in the trust corpus. He did not retain any power to alter or amend the trust instrument, or to change any trust beneficiary, or the interest of any beneficiary, nor did the trust instrument reserve to the grantor any right of reversion contingent or otherwise. His transfer of the property in trust was absolute and complete in 1923 when made. The transfer was not made in contemplation of death.

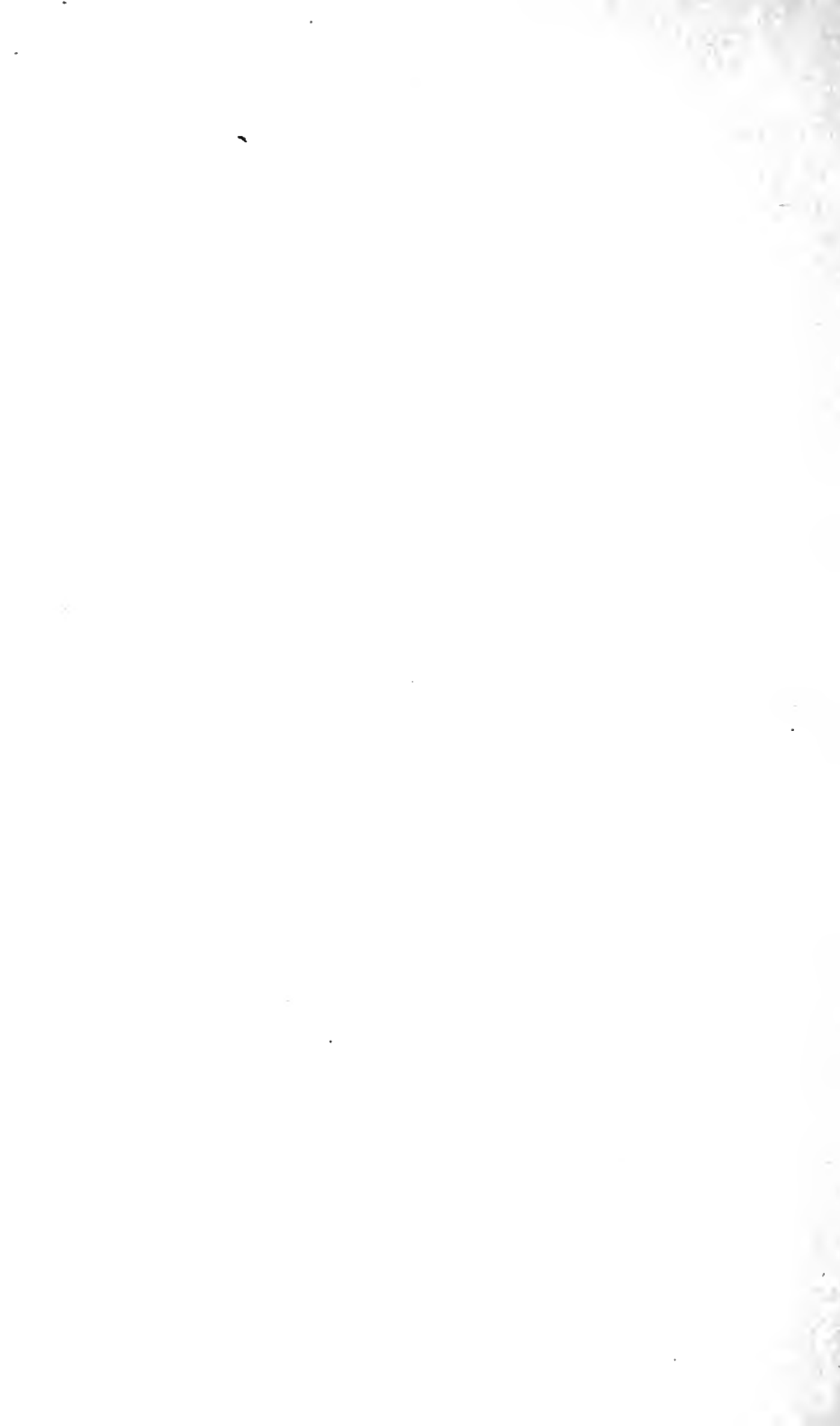
Under the rule established by a long line of unanimous decisions of the Supreme Court of the United States, and followed by that Court in its most recent decisions on the point, no part of the value of the trust corpus is includable in decedent's gross estate under the provisions of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment thereof by Joint Resolution of March 3, 1931, even though the grantor reserved to himself a portion of the trust income for life.

The decision of the Court below is in accordance with the law and should be affirmed.

Respectfully submitted,

CLARK J. MILLIRON,

Attorney for Appellee.



APPENDIX.

“Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

“(a) * * *

“(b) * * *

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. * * *

Sec. 302(c), Revenue Act of 1926.

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth.”

Sec. 302(c), Revenue Act of 1926, as amended by
Public Resolution No, 131—71st Congress.
March 3, 1931.

“(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth.”

Sec. 803(a), Revenue Act of 1932.

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Amendment V, Constitution of the United States.

AMENDMENT OF THE REVENUE ACT OF 1926.

Mr. Hawley: Mr. Speaker, I ask unanimous consent for the present consideration of a joint resolution (H. J. Res. 529) relating to the revenue, reported from the Committee on Ways and Means.

The clerk read as follows:

House Joint Resolution 529.

Resolved, etc., That the first sentence of subdivision (c) of section 302, of the revenue act of 1926, is amended to read as follows:

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom: except in case of a bona fide sale for an adequate and full consideration in money or money’s worth.”

The Speaker: Is there objection?

Mr. Schafer of Wisconsin. Reserving the right to object, and I shall object unless the gentleman explains just what the bill is.

Mr. Hawley. Mr. Speaker and gentlemen, the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his

heirs—the Supreme Court held that it goes to his heirs free of any estate tax.

This resolution is to provide that hereafter such shall not be the law. This decision will cost the Treasury of the United States \$25,000,000. That is, it will necessitate refunds in that amount. The Treasury does not know how many such trusts will be found before Congress meets again, but the opinion is that a great many will be, and it will take a very large sum from the Treasury unless this corrective legislation is enacted.

Mr. Schafer of Wisconsin. This is a bill to tax the rich man. I shall not object.

Mr. Collins. I would like to have a little more explanation.

Mr. Sabath. Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?

Mr. Hawley. It provides that hereafter no such method shall be used to evade the tax.

Mr. Sabath. That is good legislation.

Mr. Hawley. Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—Burnet against Northern Trust Co., Moraman against Burnet, and McCormick against Burnet—in which the court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for his life, with remainder to others after his death, the value of the property should not be included in the estate

of the donor for purposes of Federal estate tax upon his death.

Section 302 (c) of the revenue act of 1926 provides, as follows:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of or intended to take effect in possession or enjoyment at or after his death except in a case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income, and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the Federal estate tax.

It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will pro-

ceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.

Washington, March 3, 1931.

My Dear Mr. Speaker: The Supreme Court of the United States has recently had before it the following three cases:

1. A places property in trust by a deed which provides that the income shall be paid to B for his life, then to A for her life, and then that the trust shall terminate upon the death of A, at which time the property shall be distributed among the children of A. (May v. Heiner.)

2. A places property in trust by a deed which provides that the income therefrom shall be paid to A for her life and upon her death that the trust shall terminate and the property shall be distributed among her children. (Burnet v. Northern Trust Co., executor of Van Schaick.)

3. A places property in trust by a deed which provides that A shall have the right to call upon the income therefrom to supplement her income from other property if it falls below a given sum; reserves the right to dispose of the remainder of the income by ordering payments to others and which further provides that the trust shall terminate upon the death of the last of her three children, at which time, if A is surviving, the property will be paid over to her, and, if not, will then be paid to the issue of her children. (McCormick v. Burnet.)

The Supreme Court by decisions rendered yesterday afternoon in the Van Schaick and McCormick cases, following its decision in the case of May v. Heiner, held that the value of the property comprising each of the foregoing three trusts, at the date of A's death, was not to be included in the decedent's gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death."

The effect of these decisions is that transfers of this character are held not to be within the language of section 302 (c) of the revenue act of 1926, or of prior acts having similar language, as follows:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

It is believed desirable, in view of the character of these transfers and in order to prevent tax evasion, that they be included in the statute. The Treasury has, therefore, drafted a proposed joint resolution, which is inclosed, amending the statute so as to include such transfers.

Without this amendment, the Federal estate tax will be seriously affected. It has been estimated that the effect of these Supreme Court decisions will be to cause a loss in excess of one-third of the revenue derived from the

Federal estate tax, with anticipated refunds of in excess of \$25,000,000. While it is realized that very little time remains at this session, it is hoped that the Congress may take action by joint resolution to correct this situation.

Very truly yours,

OGDEN L. MILLS,
Acting Secretary of the Treasury.

The honorable the Speaker of the House of Representatives.

The Speaker. Is there objection to the consideration of the resolution?

There was no objection.

The resolution was agreed to.

Mr. Garner. Mr. Speaker, I ask unanimous consent to make a statement for three minutes on the resolution just passed.

The speaker. Is there objection?

There was no objection.

Mr. Garner. Mr. Speaker. ladies and gentlemen, so that the next Congress may realize this situation and may have an opportunity to think it over, I want to say that the Supreme Court yesterday handed down a decision in which it held that a trust made by a person of great wealth, say \$500,000,000, could provide for the income of it for his life and that all of the property at a certain time shall go to his children and escape the tax.

The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason

that we were afraid that the Senate would not agree to it. But I do hope that when this matter is considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive.

The Treasurer estimates that there will be a refund of \$25,000,000 to those who have died and had their estate taxed. What we hope in this resolution is to stop up this gap in the future. I hope in the next Congress a bill may be passed that will reach back and let the Supreme Court have one more guess. I use that word advisedly, they did guess and gave the exemption to these people who have made these trusts.

Mr. LaGuardia. This is to give timely notice that in the next Congress it will be made retroactive?

Mr. Garner. I have strong hopes that the next Congress will make it retroactive.

Mr. Black. Was the Supreme Court decision based on a constitutional question, or a discussion of the statute?

Mr. Garner. It was on the statute itself, and was not constitutional.

Congressional Record—House, pp. 7198, 7199,
March 3, 1931.

“To Collectors of Internal Revenue and Others Concerned:

“Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in *italic*):

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including*

a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

“In view of the decisions of the Supreme Court of the United States in *Nichols v. Coolidge* (274 U. S. 531 (T. D. 4072, C. B. VI-2, 351)), *May v. Heiner* (281 U. S. 238 (Ct. D. 186, C. B. IX-1, 382)), *Coolidge v. Long* (282 U. S. 582), *Burnet v. Northern Trust Co.* (51 S. Ct. 342), *Edgar M. Morsman, Jr., v. Burnet* (51 S. Ct. 343) and *Cyrus H. McCormick v. Burnet* (51 S. Ct. 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of Section 302(h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

“Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.”

Approved May 22, 1931.

A. W. MELLON,
Secretary of the Treasury.

T. D. 4314. C. B. X-1 450-451.

“Sec. 2280. NOT REVOCABLE. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.”

Sec. 2280, Civil Code of California, in effect prior to June 15, 1931.

“Sec. 2280. REVOCATION OF TRUSTS. Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be effected hereby.”

Sec. 2280, Civil Code of California, as amended June 15, 1931; Stats. 1931, p. 1955.



